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DONALD L. HOROWITZ

THE PROMISE AND PERILS OF DEVOLUTION

Federalism, Regional Autonomy, and Ethnic Conflict

OXFORD STUDIES IN DEMOCRATIZATION



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The Promise and Perils of Devolution

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Preface

Devolution of governing power from central authorities to lower levels of government has frequently been recommended as a technique for reducing ethnic conflict. Yet many governments have been reluctant to do so, and the technique has been the subject of considerable scholarly controversy about its efficacy and possible adverse consequences. My intention in this book is to attempt to clarify exactly what benign effects devolved authority might have in polities that are severely divided along ethnic (including religious, racial, linguistic, or other putatively ascriptive) lines. There are, in fact, many possible benefits. The book also assesses the many negative externalities that sometimes accompany devolution. The main focus is on countries with ambitious new—that is, post-World War II—federalism and regional autonomy schemes, which are mainly concentrated in Asia and Africa, although, along the way, I shall make some comparisons with experiences elsewhere. In the Prologue, I provide more detail on the plan of the book and the three main clusters of questions that comprise the volume.

In the course of the analysis, I aim to uncover some of the conditions that might make devolution more successful for conflict reduction and those that might produce the untoward consequences that are most feared by analysts and policymakers, as well as some other such consequences that are not as commonly recognized. I shall argue that the frequency of certain dysfunctions reflects more general failures of government, whose correction, though very difficult, would produce considerable gains in enhancing the benefits of devolution and, for that matter, of democratic governance in general.

Like several other publications of mine, this one grew out of a large project on the problems of ethnic conflict, conflict reduction, and interethnic power sharing. That overall project was supported by grants from the Harry Frank Guggenheim Foundation, the Carnegie Corporation, and the United States Institute of Peace (USIP), and by fellowships from USIP, the Woodrow Wilson International Center for Scholars, and the National Endowment for Democracy. To all these grantors, I express my sincere appreciation. I also benefited from released time afforded by the Bost Research Professorship at Duke Law School, for which I am pleased to express my gratitude.

Portions of the book have been presented in lectures or seminars at the Center for American Progress in Washington, DC, the lecture series of the

McGill University Research Group on Constitutional Studies, the Herbert Bernstein Lecture Series at Duke Law School, the Colloquium Politicum of the Arnold Bergstraesser Institute at the Alberts-Ludwigs-Universtität in Freiburg, the Nanyang Technological University in Singapore, the Yale University South Asia Council conference on Federalism in South Asia, the Northwestern University-sponsored conference on the Law and Politics of Federalism, the Brawijaya University conference on Democracy in the Age of Uncertainty in Malang, Indonesia, the Emerging Scholars Conference at the Government Department of the University of Texas at Austin, and the University of Exeter in the UK. I am grateful to my hosts on these occasions, respectively: Mara Rudman, Jacob Levy, Ralf Michaels, Andreas Mehler, He Baogang, Steven Wilkinson, Erin Delaney, Juwita Hayyuning Prastiwi and Wawan Sobari, Zach Elkins, and Elena Gadjanova.

Along the way, I have been helped by several very capable research assistants, most notably Jameris Ocasio-Palacio, whose careful work was exceptionally useful. Mongina Osoro and Oluwabamise Onabanjo also made important contributions on Kenya and Nigeria, respectively. Margo Besnard assisted with Czechoslovak materials. Jack Dippolito provided invaluable assistance in locating recent decisions and updating case law from India, Nigeria, and Kenya during the period in which I was revising the manuscript.

The book could not have been completed without the aid of Lauren Maxey, who demonstrated repeatedly her truly outstanding problem-solving capacity, for which I am much in her debt. Jennifer Behrens at the Duke Law Library proved, once again, to be thoroughly indispensable in locating and providing materials, including some from quite obscure sources whose remoteness might defeat ordinary mortals. The Duke Law Library continues to be a superb reference library, with the most customer-centric professional personnel.

I am indebted, too, for invaluable suggestions from Rehan Abeyratne, Edward Aspinall, Sanjib Baruah, Upendra Baxi, Jacques Bertrand, Conrad M. Bosire, Simon Butt, Melissa Crouch, Rohit De, Emma Elfversson, Yonatan Fessha, Uddipana Goswami, Andrew Harding, Robert Kaufman, Christina Murray, Julio Antonio Rios Figueroa, Dian A. H. Shah, Farhan Hanif Siddiqi, Rotimi Suberu, Wilfried Swenden, Emmah Senge Wabuke, and Steven Wilkinson. Of course, none of these professional colleagues can be held responsible for my treatment of the areas on which they kindly tendered suggestions. I am also grateful to two anonymous readers, whose insightful comments on the manuscript proved helpful in revising portions that required more exposition.

While I am speaking of indebtedness, there is, once again and always, Judy Horowitz, whose name belongs in a book on devolution. She both gives and receives devolved power, sometimes imperceptibly, always generously and responsibly. She is the keeper of our family constitution.

Finally, a note on terminology. I use the term *devolution* to refer to the delegation of powers below the central government, through federalism or regional autonomy. In speaking of what is sometimes called the *national state*, a term I occasionally use, I shall also refer to *the state* or *the overarching state*, if that is necessary to distinguish it from a state in a federation. For such states in a federation and for regions in a scheme of regional autonomy, I also use the term *units* or *devolved units*. The aim is always to reduce the chance of ambiguity, which I hope is also facilitated by clarity in the context.

Donald L. Horowitz

Prologue

What This Book Is About

A large literature deals with the possibility for federalism and regional autonomy to reduce the incidence of violence in dissident regions. Some studies focus on the degree of autonomy afforded; some on the timing of autonomy, whether before or after separatist violence has occurred, and whether autonomy is coupled with interethnic power sharing; and some are concerned with the specific powers that are devolved under various conditions. Despite the different questions they ask and the various methods and data they employ, most studies, but by no means all, conclude that devolution has the capacity to reduce the incidence of violence among dissident ethno-regional groups. The contribution of devolution to peace is the major theme in the literature. A slightly distant second is the contribution of devolution to democracy.

This book is not at all indifferent to these concerns. It deals with three important inquiries, the answers to which should contribute to a richer understanding of the prospects for the success of federalism and regional autonomy in enhancing peace and democracy. The book can be thought of as containing three parts corresponding to those three inquiries.

The first part consists of two chapters dealing with some specificities of devolution. Chapter 1 concerns varieties of, justifications for, and obstacles to subnational governance. The second chapter lays out some hypotheses about some often-neglected mechanisms, mainly concerning ethnic-group relations, that might underlie the anticipated beneficial effects of devolution in varying circumstances, and it distinguishes these benefits from the narrower range of central government motives that usually underlie the decision to devolve power. It also enumerates multiple obstacles to devolution.

Part II of the book evaluates longstanding differences among scholars and political leaders about the benefits and risks inherent in establishing a system of federal or regionally autonomous units. Apart from the common reluctance to confer authority on ethnic or political opponents, one risk that recurrently motivates hesitancy to devolve power is the apprehension that, rather than assuaging ethno-regional discontent, federalism or autonomy will facilitate secessionism and, in some cases, secession itself. These fears bedevil the deliberations of central governments and have given rise to

a cautionary academic literature weighted toward confirming the fears, particularly after the emergence of multiple newly independent states upon the dissolution of the Soviet Union, Yugoslavia, and Czechoslovakia.

Chapter 3 consists of an extended review of the evidence that shows those fears and the interpretation of history underlying them to be unfounded. Chapter 4 shows that the ways in which central governments have acquired certain territories and handled demands for devolution—by failing to act, or delaying action, or backtracking on devolution—can foster secessionism. This is an explanation very different from and, in some ways, quite opposite to one that cites federalism or regional autonomy as a principal cause of secessionism.

Part III, the final and most extended portion of the volume, brings us full circle from the contested interpretation of the politics of devolution to several prominent dysfunctions and even some pathologies associated with devolution. In contrast to the fear of secession, most of these dysfunctions are not usually anticipated by decision-makers or discussed in the general literature on devolution, except in country-specific studies.[1] Yet they are recurrent and arise mainly from the internal politics of devolved units. Most have their roots in the desire of one ethnic group to dominate a devolved unit and of others to resist that domination. Considerable ethnic discrimination and violence are often associated with these struggles. Ironically enough, some of these dysfunctions within devolved units may coexist with the reduction of ethnic conflict at the level of the central government. The relief of conflict at the central government level can sometimes open the door to increased conflict at the devolved level. As the book's title implies, the promise of devolution also contains perils.

The first of the five chapters of Part III, Chapter 5, describes the dysfunctions and their causes. Chapters 6 and 7 deal with prospects for amelioration of the most serious dysfunctions, especially prospects within the constitutional and legal systems that generally proclaim ethnic equality and prohibit ethnic discrimination. The chapters show, despite the best efforts of most courts, the frequent incapacity of judiciaries to cope adequately with these severe dysfunctions in the six Asian and African countries whose constitutional provisions and attempts at redress through legal systems are examined in detail. Chapter 8 considers further the possibilities for remediation, based

[1] In a 2023 International Association of Constitutional Law blog series on "Territorial Autonomies," not one of the many contributions concerned malign interethnic interactions in autonomous territories. But see an entry that appeared as this book went to press: Andreas Juon, "Territorial Autonomy and the Trade-Off between Civil and Communal Violence," *American Political Science Review*, Vol. 119, no. 1 (2025), pp. 91–107.

on resources available in the six countries, each of which exhibits somewhat different deficiencies from the others in the ability to achieve redress. The chapter suggests some promising avenues that might be considered by political and, especially, judicial decision-makers in the affected countries.

The concluding chapter undertakes three main tasks. It provides a very brief summary of the preceding chapters; evaluates some hypotheses about devolution and conflict reduction that were enumerated in Chapter 2; and deals with some of the difficult rule-of-law problems that are at the root of the most egregious pathologies of devolution described in Chapter 5 and encountered by courts in subsequent chapters.

In parts of the book, I resort to excurses into examples of the phenomena that are central to its causal accounts, in order to view the phenomena at issue at close range. Of course, causation comes in categories, but it also arrives in instances. I aim to neglect neither. As I hope this description makes clear, this book is, in equal parts, about politics and law, both of which have strong roles to play in the reduction of conflict.

As this is being written, devolution is certainly not standing still. There are, for example, proposals for creating new federal states in Pakistan and vigorous debates about adopting federalism to redress the problems of ethnosectarian divisions in unitary Lebanon. Ethiopia is in the very early stages of rethinking its federal arrangements. Many people in Catalonia seem to favor independence of their devolved region from Spain, whereas the Basque Country appears to have reached a modus vivendi with its devolved status. And after many years of negotiation and warfare, the Philippines is preparing to implement an autonomy plan for a heterogeneous but Moro-dominated region in the South. I hope the evidence assessed in this volume can help in evaluating the probable impact of proposals and plans such as these, especially on ethnic relations in the overarching state and within proposed units, and can point to some recurrent problems that need to be addressed in advance rather than encountered as unpleasant surprises after the fact of devolution.

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PART I

OPPORTUNITIES AND OBSTACLES

1

Territorial Innovation

A Vertical Separation of Powers

Proliferating the points of political power is a time-honored strategy to make it difficult for any group, faction, or party to gain dominion over all others. This strategy underpins the horizontal separation of powers, and it also furnishes a rationale for a vertical separation of powers between the center and its constituent units. Techniques of dividing territory and conferring power on territorial units below the overarching state are remedies often recommended, and almost as often disputed, for the reduction of ethnic conflict. These techniques are not likely to be the universal solvent for conflict among ethnic groups, but they can certainly have beneficial effects and are, at least at first glance, unlikely to produce the most-feared consequences. Devolution deserves a place in the toolbox of those who aim to reduce conflict and encourage accommodation. Nevertheless, while devolution may ease some problems, it may create or exacerbate others. This book concerns the easing, the exacerbation, and the hope for a net benefit at the end of the process.

For some purposes, federalism and regional autonomy need to be thought about separately, because the former involves a division of sovereignty between a central government and the states or provinces that comprise its constituent units, whereas autonomous regions are units that usually do not enjoy sovereign powers. That is certainly the case if we are concerned with demarcating the boundaries of authority between a central government and its federal units, but many schemes of regional autonomy also have constitutional status. In this volume, however, we are concerned with autonomy, whether as a feature of federalism or of arrangements for devolution short of federalism. In any case, for most of our special purposes, which relate to the incidence and reduction of ethnic conflict, the distinction between federalism and regional autonomy is not vital, except insofar as withdrawal of autonomy by a central government is easier to accomplish if the autonomy is not constitutionally protected. In constitutional theory, the cardinal principle of federalism is territorial pluralism, as Stephen Tierney has argued, and a

measure of territorial pluralism is also central to regional autonomy schemes to satisfy ethnic aspirations or redress conflicts.[1]

Federalism or regional autonomy short of federalism—which can be bracketed together for present purposes as *devolution*, a term I shall use repeatedly—can perform important functions for severely divided polities, those in which two or a few ethnic groups are engaged in conflict to control the state or prevent control by others. Many of these functions can, at least potentially, serve to reduce intergroup political conflict. Yet the number of states in the world with devolved institutions seems to be much smaller than the number that could benefit from federalism or delegation of power to regional authorities. This apparent shortfall in the incidence of devolution necessarily requires an investigation of the attractions of and obstacles to decisions to devolve power. We shall also consider the effects of certain features of devolution arrangements, as these have been revealed in case studies, and the extent to which the functions that might be performed by devolution actually yield benefits. And, as I stated in the Prologue, we shall need to deal, and deal extensively, with certain recurrent dysfunctions of devolution and what might be done about them. Much of what needs to be done involves legal remedies.

As we go about this task, we shall, as I have said, discover some surprises. Some of the main problems that are assumed to result from federalism in ethnically divided countries do not appear with the frequency that has been supposed. On the other hand, some problems that have not been anticipated or been analyzed very thoroughly appear recurrently and usually rather severely. We shall need to explain why both surprises occur and what might be done to mitigate those that do. But we need to begin by discussing the two principal forms of territorial change, the relationship of devolution to principles of majority rule, and some of the general problems that sometimes inhibit the adoption of devolved institutions.

Two Varieties of Federal Innovation

When federalism was devised in the United States more than two centuries ago, its purpose was to build a larger polity out of smaller polities. It had been thought, based on experience with ancient republics, that small size was an essential ingredient in republican government.[2] But *The Federalist Papers*

[1] Stephen Tierney, *The Federal Contract: A Constitutional Theory of Federalism* (Oxford: Oxford University Press, 2022), pp. 167–71.

[2] For the association of small size with democracy, see Larry Diamond, *Developing Democracy: Toward Consolidation* (Baltimore: Johns Hopkins University Press, 1999), pp. 117–21; Edalina Sanches

(especially numbers 9, 10, and 14) argued that by proliferating contending factions and balancing their effect, federalism could provide a new way to extend the range of republican government beyond what had previously been thought possible.[3]

Coping with the expansive territorial base of a polity through the device of federalism proved to be an attractive technique. In the nineteenth century, there was great enthusiasm for federal institutions in Latin America, where federalism responded to a variety of specific problems.[4] Switzerland and Germany used the same federal technique, and later so did the British Colonial Office in portions of the Empire and several independent countries that issued from it. As of 2022, however, according to the Forum of Federations, there were only 25 federations in the world. To this list a few others might be added, although they do not use the "federal" designation. Several more unitary states have asymmetrical federal relations with one or more, usually distant, territories, while others have granted autonomy to regions without formal federal arrangements, and the arrangements of some of these have constitutional status.[5]

Almost no large state that is governed democratically is not a federation.[6] Forty percent of the world's population lives under federal regimes. Nevertheless, 25 is not an impressive number, and all but a handful of the 25 listed federations antedate the Third Wave of democratization that began in 1974. Most new democracies have not found federalism attractive, except under certain exigent conditions likely to minimize the fear of secession.

The fact that large democratic states tend to be organized federally suggests that the original message emanating from Philadelphia in 1787—that federalism was a solution to the problem of scale—has been heard and acted upon. But for ethnic conflict today, this is not the most significant message. If it were possible to unite states that attained independence separately in larger

et al., "African Exceptions: Democratic Development in Small Island States," *Journal of International Relations and Development*, Vol. 25, no. 1 (2022), pp. 210–34.

[3] In this, but perhaps not exactly this, particular advantage, the American framers were anticipated by Montesquieu, whom they greatly admired. Montesquieu saw "the confederate republic," in which small states join together to form a larger one, as useful for three purposes: common defense, defense of each against the others, and prevention or redress if there should be a popular insurrection or internal abuse in any of the units, which would be vulnerable to intervention or expulsion of the miscreants by the other units. Montesquieu, *The Spirit of the Laws*, transl. by Thomas Nugent (New York: Hafner, 1949), Book IX, pp. 126–32.

[4] For the various countries in which federalism was adopted in the early post-1787 period, see Donald L. Horowitz, "*The Federalist* Abroad in the World," in Ian Shapiro, ed., *The Federalist Papers* (New Haven: Yale University Press, 2009), pp. 502–32, at pp. 504–06.

[5] As already mentioned, I mean the term *devolution* to bracket both federalism and regional autonomy.

[6] Alfred Stepan, "Federalism and Democracy: Beyond the U.S. Model," *Journal of Democracy*, Vol. 10, no. 2 (1999), pp. 12–26.

federations, the scaling-up federalism of 1787 would have a new relevance, as it does, in some modest sense, for the European Union.

Yet efforts to unite formerly sovereign territories have often met with failure. The British West Indies Federation, the East African Federation, the Mali Federation, the Federation of Rhodesia and Nyasaland, the Senegambia Federation, and the United Arab Republic all dissolved within a short period of time, often because of power imbalances between or among their component units. Although international regional integration of this sort might hold considerable advantages for reducing ethnic conflict by making it more difficult for any one group to control the state, exactly such prospects make its accomplishment improbable. Those who possess advantages are disinclined to abandon them, even if doing so means they have to operate on a smaller scale.

Even scaling up by absorbing small territories and by establishing special relationships with the center has proven difficult. Ethiopia abolished its federation with Eritrea in 1962, within its first decade, just as Cameroon did later with the English-speaking Cameroons territory. Both then administered the combined territories as unitary states, an arrangement from which Eritrea managed to escape in 1991. Malaysia expelled Singapore from its expanded federation within two years of unification, and the special guarantees accorded to the Borneo states of Sabah and Sarawak at the time they joined Malaysia were slowly whittled down. The relationship of Zanzibar and Tanzania survives as an exceptional case, while the dissolutions of the Soviet Union, Yugoslavia, and Czechoslovakia all testify that even the arrangements of federations scaled up long ago can be undone. Others, however, I shall suggest later, are much more difficult to undo through secession, despite frequent attempts.

Scaling-up federations that antedated or coincided with independence have a mixed record of survival. Federations have endured in India and Nigeria, albeit in greatly altered form, and more weakly in the Comoros and in Pakistan, but in the latter only after the secession of Bangladesh and in the face of continuing discontent about its configuration and imbalances. Like many federations, Malaysia's has been highly centralized since independence.

Beyond scaling up, there is a different form of federal innovation that is highly pertinent to severely divided societies—namely, scaling-down federalism, in which sub-state units are empowered to respond to problems of ethnic diversity.[7] This form of federalism does not need to be a function

[7] Scaling-up and scaling-down federalism correspond to what Stepan, in "Federalism and Democracy," refers to as "coming together" versus "holding together" federalism.

of population or territory size. Most states in the world are relatively small, and few small- or medium-sized states that were ethnically divided considered federal institutions to be a serious choice at independence or redemocratization. Had they done so early on, even relatively small states, such as Sri Lanka, could probably have spared themselves a great deal of pain. Yet most remain reluctant to devolve significant power.

New federations—Belgium, Bosnia, Iraq, Nepal, Spain, South Africa—have been relatively rare. In every case, they are scaling-down federations, and sometimes their federalism is intended to be a lesser version of partition. Ethiopia, Sudan, South Sudan, and Somalia are all, in form at least, federations, but all of them have experienced serious, ethnically related contests for power at the center and discontent leading to separatism. Federalism was rejected in Afghanistan when its constitution was framed in 2003 and has repeatedly been rejected in Sri Lanka, before its war with the Tamil Tigers began in 1983, during its protracted negotiations with the Tigers over the next two decades, and since the war ended in 2009. In Myanmar,[8] the form of a proposed federation has been a contentious issue. Even its place on the reform agenda has been contested. The National League for Democracy of Aung Sang Suu Kyi, a mainly Burman party, had wanted to do democratic reform first, whereas the minorities had preferred to secure a firm commitment to a federal regime with strong powers lodged in the states at the outset of the reform process.[9] In 2021, the military decided it could not abide the electoral results that have followed its initial, partial reforms, so the debate over democracy and federalism was suspended while the military resumed complete power, which provoked renewed warfare. Myanmar seemed destined for a federal dispensation, but it has not had a fully democratic dispensation for well over a half-century.

Yet, overall, federalism and regional autonomy are becoming increasingly attractive to ethnically troubled countries, although instability, resistance at the center, and insurgency at the periphery may yet abort the creation of some federal states or plans for regional autonomy. After many years of deliberation, Nepal created a federation in 2015, but disputes over its configuration produced considerable violence and discontent. Somalia's central government has limited control of the country. Yemen's civil war was precipitated by

[8] I use "Burma" and "Myanmar" interchangeably, generally "Burma" for the period before the official name change. Myanmar is a term adopted by the military regime in 1989 and is not uniformly accepted in the country. Indeed, some minorities contest both names as being associated with the majority group, for which I use the term "Burman" or "Bamar."

[9] Nyi Nyi Kyaw, "Democracy First, Federalism Next? The Constitutional Reform Process in Myanmar," ISEAS Perspective Series, Singapore, no. 93, November 8, 2019.

a proposal for a federal state that was deemed inadequate in the proposed distribution of the country's resources. Sri Lanka remains stalemated in its quest for an appropriate regime of devolution after quite promising constitutional discussions were aborted in 2018. For territorially concentrated minorities, devolution is often a shiny object just out of reach.

Nepal's new federation is clearly a case of scaling down, but Somalia's attempt at federalism is a hybrid. Somalia needs a federal structure not merely to accommodate ethnic ("clan") interests but to open the way for the Puntland region to retain its hard-won autonomy and ultimately, perhaps, for separatist Somaliland to rejoin the state it abandoned decades earlier.[10] If Yemen is to survive as a single state, it needs a federation for intergroup accommodation and for the continued unification of previously separate North and South Yemen. The two types of federation—scaling-up and scaling-down—are not always wholly discrete, but scaling up, as I have said, does seem generally much more difficult to accomplish and, once accomplished, to maintain.

Regional autonomy has also proven difficult to adopt. Africa has few cases of devolution to regional authorities.[11] Kenya is a notable exception, as are Uganda and Tanzania, the latter insofar as Zanzibar is concerned. As I have mentioned, South Africa, Sudan, South Sudan, Nigeria, and Ethiopia have federal systems, but some are more robust than others. Several experiments in federalism and regional autonomy elsewhere in Africa have been attempted, mainly on an asymmetrical basis, and others have been ended by authoritarian regimes, or been promised but not delivered, or become increasingly centralized, as in Comoros since 2018.

The same is true of Asia, but again there are notable exceptions: federalism in India, Pakistan, Malaysia, and more recently Nepal, as well as the suspended authoritarian variant in Myanmar; extensive regional autonomy in Indonesia, the longstanding efforts to create autonomous regions in the southern Philippines, and the limited (and time-limited) case of Hong Kong, now cut short by Beijing, and Macau after their return to China in 1997. Territorial autonomy of any kind is rarely granted with enthusiasm. For the most part, it is conceded after a long struggle, and it is subject to attempts to renege.[12] The effective withdrawal of autonomy from Hong Kong by China in 2020 is one among many attempts to retract powers earlier conferred,

[10] Somaliland has also claimed portions of Puntland as part of its territory.

[11] Christof Hartmann, "Territorial Power Sharing and the Regulation of Conflict in Africa," *Civil Wars*, Vol. 15, no. S1 (2013), pp. 123–43.

[12] Central leaders sometimes have incentives to devolve power, quite apart from threats of violence. See, e.g., Anoop Sadanandan, *Why Democracy Deepens: Political Information and Decentralization* (Cambridge: Cambridge University Press, 2017).

although more blatantly in violation of commitments than most. Central governments prefer to be in charge.

Federalism and Majoritarianism

In a work still relevant to current affairs after nearly two centuries, Alexis de Tocqueville asserted that "the greatest danger of the American republics comes from the omnipotence of the majority," which might bring "minorities to despair" and produce "anarchy."[13] Tocqueville was not referring to ethnic (or racial) minorities, but to any who might not share the preferences of the majority. In his chapter on "what tempers the tyranny of the majority in the United States,"[14] the very first item in the inventory of protections is the "absence of administrative centralization," the fact that the central government possessed limited instruments of enforcement and was obliged to depend on levels of government below the center to carry out its wishes, which, he maintained, they did only imperfectly and not uniformly.[15] The American government is today far more centralized and administratively capable, and Tocqueville was quick to point to other safeguards against majority tyranny, but the federal idea—that diffused power can mitigate majority tyranny—is an enduring one that can perhaps do service with respect to ethnic majorities and minorities as well as to any other majorities and minorities.

Before it can perform this service, there is an aspect of majoritarianism that needs clarification. The functions of federalism and devolution that we shall soon explore have much to contribute to an understanding of majoritarianism.[16] Federalism makes something obvious that can be obscured when we speak of majority rule within undifferentiated unitary states. That something is the arbitrary character of territorial boundaries within which we count majorities.

Once a state contains internal boundaries within which electorates are partitioned, it is possible that an overall nationwide majority group will comprise only a minority in many or even most devolved units, depending on how geographically concentrated the majority population is. For the strictest majoritarians, this possibility might suggest that federalism or

[13] Tocqueville, *Democracy in America*, transl. by Harvey C. Mansfield and Delba Winthrop (Chicago: University of Chicago Press, 2000), pp. 248, 249.
[14] Ibid., p. 250.
[15] Ibid., pp. 250–51.
[16] See Thomas O. Hueglin, "Federalism and Democracy: A Critical Reassessment," in Grace Skogstead et al., eds., *The Global Promise of Federalism* (Toronto: University of Toronto Press, 2013), pp. 17–42.

regional devolution is inherently undesirable, because it might—probably will—derogate from majority preferences in the overarching state considered as an undivided whole.

Yet there is a prior question obscured by undifferentiated majoritarianism: the question of political community. Just as the territorial boundaries of the state—so-called national boundaries—allow the partition of one political community from others that are adjacent, so, too, do boundaries between federal units or their equivalents in regionally devolved systems. Majority rule is incoherent without a prior determination of the commonalities that accompany and support political community. It is reasonable to think that there is a plurality of such boundaries that might be drawn between national states and within any such given national state. The division of territories and the creation of new states following the dissolution of empires, from the Ottoman and Habsburg right up to the Soviet Empire, makes that clear.

Sometimes commonalities among citizens within independent states are very thin, even arbitrary, but not necessarily any thinner than those that divide states internationally. Territorial demarcation between one sovereign entity and another may be accepted, not because it has been thoughtfully established and agreed by populations on both sides of the boundary, or by those on either side, but because any alteration of the existing boundary might entail inconvenience or disruption or violence, costs that would outweigh the benefits of alteration. Boundaries may reflect deep cultural differences, or they may be accepted because of what common law property lawyers call prescription—long, unchallenged occupation. Given the undesirable alternatives, especially secession, whose potential benefits are often greatly exaggerated,[17] that is a good reason to accept territorial boundaries in the vast majority of cases. Yet it would be unjustifiable to exaggerate the normative legitimacy of most national-level boundaries and to declare that majorities must always be counted only within those boundaries, rather than segmented at levels beneath them.

In severely divided societies, in which two or a few ascriptive groups contend for control of the state, majority rule at the center constitutes the very phenomenon that is most productive of conflict. To fractionate conflicts by creating differing majorities at various territorial levels and across territorial units—to create or to recognize an array of political communities within a single state—may be to mitigate the possibility for abuse that the single,

[17] See Donald L. Horowitz, "The Cracked Foundations of the Right to Secede," *Journal of Democracy*, Vol. 14, no. 2 (2003), pp. 5–17. See also Horowitz, "Self-Determination: Politics, Philosophy, and Law," in Ian Shapiro and Will Kymlicka, eds., *Ethnicity and Group Rights, NOMOS XXXIX* (New York: New York University Press, 1997), pp. 421–63.

national-level majority allows.[18] In this respect, devolution allows a vertical separation of powers.

A serious commitment to federalism, and sometimes even to regional autonomy, is frequently thought to entail representation of federal or regional units in an upper house, typically on the basis of equal or nearly equal representation of each unit. If the standard of majoritarianism is the ability of an undifferentiated majority to rule unimpeded at the overarching national level, the equal representation of federal units in a senate does not meet that standard. But that is exactly the point. The equal representation of federal units supports a central aim of federalism precisely by reinforcing the capacity of the units to resist undifferentiated majority rule at the center. The extreme malapportionment of an upper house that accords equal representation to highly unequally populated units may give cause for concern,[19] especially in federations where people no longer identify strongly with particular territories or with groups that populate those territories—where, for example, geographic mobility has undercut those identifications, as it has to a considerable degree in many regions of the United States. In general, however, the equal representation of federal units in a senate, by itself, supports the democratic power of those who might lose habitually if majority rule prevailed in the undifferentiated overarching state as a whole.

The justification of federalism does not, therefore, require abandonment of democratic principle, or even of majoritarianism, once it is recognized that majority rule within federal or similarly devolved units possessing some degree of autonomy has a claim on democratic legitimacy deriving from the arbitrary character of the boundaries of the overarching state and the power those boundaries would otherwise accord to a majority assembled within those undifferentiated boundaries. Even if there were doubt about this proposition, the justification of federalism or devolution, with its differently composed majorities, could easily rest on its conflict-reducing possibilities. If, after all, majority rule were in tension with civil peace or with the freedom of ethnic minorities from majority oppression, those who choose majoritarianism as an absolute value, rather than one that must be accommodated with other highly important values, would have an impossible burden of

[18] For multiple examples of deviations from majority rule in the overarching state, see Neophytos Loizides, "The Cyprus Negotiations and the One Person-One Vote Principle: Examples of Divergence from Democratic Federations," http://works.bepress.com/neophytos-loizides/18.

[19] See Sanford Levinson, *Our Undemocratic Constitution* (Oxford: Oxford University Press, 2006), pp. 49–62. For degrees of overrepresentation in upper houses in federal systems, see Juan J. Linz and Alfred Stepan, "Some Thoughts on Decentralization, Devolution, and the Many Varieties of Democratic Federal Arrangements," in R. William Liddle, ed., *Crafting Indonesian Democracy* (Bandung: Mizan, 2001), pp. 209–18, at p. 211. The degree is highly variable from one federation to another.

justification to bear. Or, to put the point more sharply, as Jacob T. Levy has, it is not federalism alone that mitigates majoritarianism: constitutionalism itself, including institutions such as judicial review, involves "leaning against" the tendencies exhibited by majorities to have their own way.[20]

Of course, nothing said here makes the case for devolution specifically to ethnically homogeneous units, any more than commitment to national-level boundaries makes the case against devolution in general. Subnational boundaries depend, at least in principle, on the goals to be achieved by creating them. As we shall see in short order, the units may be homogeneous, heterogeneous, or some mix of the two.

Adoption Problems

Like other institutional innovations for ethnic conciliation, which frequently encounter resistance when proposed, devolution has an adoption problem—actually, several adoption problems.[21] If there are adoption problems establishing power sharing at the center—horizontal power sharing—it is only to be expected that there will be comparable problems in establishing power sharing vertically, with regional authorities. In many cases of power sharing at the central government level, there may be clear gains to be had: larger majorities or coalition governments that enhance the authority of parties to the arrangement,[22] positive-sum transactions. Devolution, however, is easily thought of in a different way: as a source of less power at the center and a source of risk in devolved regions. These adoption problems reduce the occasions for creating autonomous subunits when they might be useful in reducing conflict.

First, to the extent that majorities are in power at the center, reluctance to cede authority to regions is just one among many manifestations of the preference of majorities for majority rule, frequently exacerbated by the unpopularity of regional minorities whose perceived troublesomeness or agitation gives rise to demands for devolution. In many early cases, devolution preceded democratization and was easier on that account. In an undivided

[20] Jacob T. Levy, "National Minorities without Nationalism," in Alain Dieckhoff, ed., *The Politics of Belonging: Nationalism, Liberalism, and Pluralism* (Lexington: Lexington Books, 2004), pp. 155–74.

[21] For a brief treatment of obstacles to certain innovations for conflict reduction, including adoption problems, see Donald L. Horowitz, "Ethnic Power Sharing: Three Big Problems," *Journal of Democracy*, Vol. 25, no. 2 (2014), pp. 5–20.

[22] I am referring to those power-sharing arrangements based on interethnic vote pooling. See the contributions in Donald L. Horowitz and Helen Ting, eds., *Ethnic Vote Pooling and Centripetal Politics* (forthcoming, 2026).

state, majority public opinion can make devolution more difficult.[23] Leadership at the center has a key part to play in promoting durable devolution and cooperative relations with devolved regions.[24]

Second, those who govern tend to think that devolution is appropriate only for large states that need to mitigate administrative incapacity deriving from distance from the capital and diseconomies of excessive scale: to put it bluntly, they claim that devolution is not for small states.[25] In fact, even smaller states can benefit, as I shall show below.

Third, a major obstacle to devolution is the fear of central government decision-makers that devolution will encourage or facilitate secession in devolved regions or provide an undesirable demonstration effect.[26] This fear usually goes hand in hand with apprehensions about the intentions of political opponents and/or antipathy toward ethnic minorities who demand devolved authority. The apprehension is usually overblown, but it can become a self-fulfilling prophecy when it motivates central governments to delay devolution until separatist sentiment has become pervasive or causes central governments to renege on earlier commitments to devolve power. As we shall see, secession is usually encouraged by other, quite specific conditions, rather than by devolution per se. On the other hand, certain identifiable design features of devolution schemes are likely to contribute to the ability of devolution to mitigate conflict at the center.

We shall pick up the subject of obstacles again later. Despite their benefits, devolved arrangements are often difficult to agree upon and, once created, can be plagued by an array of pathologies. Some of these pathologies are traceable to poorly conceived territorial configurations. Others derive from lowering the territorial level at which groups interact, without taking precautions against local ethnic bias and rent seeking. To secure the benefits of devolution and minimize the pathologies, constitutional designers need to choose appropriate configurations and provide assurance that the central government is capable of responding to negative externalities that may follow

[23] See H. Kwasi Prempeh, "Africa's 'Constitutionalism Revival': False Start or New Dawn?" *International Journal of Constitutional Law*, Vol. 5, no. 3 (2007), pp. 469–506.

[24] Henry Hale, "The Double-Edged Sword of Ethnofederalism: Ukraine and the USSR in Comparative Perspective," *Comparative Politics*, Vol. 40, no. 1 (2008), pp. 293–312.

[25] See, e.g., Cyrene Siriwardhana, "A Study in Contrasts: Federalism in Selected African Countries," in Ranjith Amarasinghe and Jayampathy Wickramaratne, eds., *Power Sharing: The International Experience* (Colombo: Institute for Constitutional Studies, 2011), pp. 170–93, at p. 191. Federalism, the author says, is for countries with large territories or populations; it "does not really fit Sri Lanka." In a constitutional revision exercise that took place from 2015 to 2018, chief ministers of Sri Lankan provinces, in the Sinhalese South as well as in the Tamil North, made clear that this was not their view.

[26] See, e.g., Zsuzsa Csergö, "Kosovo and the Framing of Non-Secessionist Self-Government Claims in Romania," *Europe-Asia Studies*, Vol. 65, no. 5 (2013), pp. 889–911, on the influence of Kosovo's secession on the Hungarian minority's demands for devolution in Romania.

upon devolution of authority. Not all central governments are able to do so. A good many have not done so.[27]

If scaling up appears to be much more difficult than scaling down, because of the habitual resistance of groups and leaders in already-sovereign polities to surrender part of their power by joining a new federation, scaling down also faces impediments. Creating multiple majorities by expanding the arenas in which majorities can be counted would appear to be attractive in mitigating problems of majoritarianism in the undivided state. Even so, the reluctance of established majorities to surrender a portion of their power will often make devolution more difficult than it might otherwise be, and lack of enthusiasm will also mean that arrangements for devolution will frequently be imperfect or poorly thought through, and enforcement unfaithful to the agreed scheme.

The rationales for combining separate territories into a new federation, on the one hand, and having a central government devolve power to separate constituent units, on the other, have tended to be quite different. Federalism that amalgamates separate units has been promoted for its economies of scale, including larger markets, and the capacity of the larger polity to defend against external enemies, as well as its occasional propensity to unite groups sharing ethnic affinities. Division of an existing polity, by contrast, can allow people to live together for some purposes and apart for others. This form of devolution federalism or regional autonomy has also been promoted to reduce span-of-control problems and diseconomies of very large scale, to cater for multiple tastes and identities, and to share power more widely than can be done with a single central government. It is the latter sense that we shall be concerned with here, and not merely with federalism as such, but with devolution to any units that are to possess a significant measure of autonomy.

[27] See the chapters in Part III.

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2
Motives, Functions, and Inhibitions

Like many decisions, the central government decision to devolve power to lower-level units is usually based on a firmer appreciation of past problems than on clear-eyed anticipation of how the decision will work out. Accurate forecasting is, of course, always difficult, but devolution is sometimes adopted with only a general idea that it will make things better or, in some cases, will preserve a desirable status quo or reduce disruption to it. This means that at least some consequences of the decision will often prove surprising, as we shall see in some detail in various chapters.

The Motives for Devolution

The precise motives for devolution in multiethnic countries fall into more or less determinate categories. Leaving aside span-of-control issues,[1] the most common motive is the need to deal with the discontent of one or more ethnic groups, usually but not always minorities, especially if that discontent threatens to create conflict at the level of the central government.[2] In many cases, the aim is to accord groups powers to exercise in their own units that they do not have in the undivided state or in an existing unit in an already-devolved dispensation. Either of these goals can give rise to the creation of units regarded as ethnic homelands, with or without official recognition of that status. The desire to revise a dysfunctional design or one potentially dangerous to the central government or to its ruling party is also a rare but not unknown motive, typically implemented by creating multiple territorial compartments where previously there had been fewer.[3] In other cases, devolution is intended to separate ethnic antagonists. So, one strategy involves empowering minorities; another may entail disempowering (at least to some degree) majorities or pluralities so as to dilute their overweening power in

[1] By which I mean the difficulty in large countries of governing effectively from a single capital.

[2] Belgium, Bosnia, Indonesia, Iraq, Myanmar, the Philippines, Spain, Sudan, and South Sudan, among others, fit this description.

[3] For example, Nigeria's proliferation of states and India's linguistic states, as well as Indonesia's autonomous regions, greatly expanded the number of devolved units.

their previous unit(s); while a third concerns neither of these aims but is simply intended to reduce conflict by increasing the homogeneity—and, as a result, the number—of units.

Devolution is, in some cases, an improvised response to grievances that may have simmered for quite some time. In those cases, it is not so much a choice by an accommodationist regime as a reluctant move made late in a conflict sequence, perhaps by a unitary—and perhaps strongly unitarist—government. If it does not satisfy those grievances, or if it intensifies them, it may give rise to regret and retrenchment by the central government.

To put the choices more concisely: The goal for some is to mitigate group discontent by delegating powers not currently possessed, within preexisting or new boundaries. For others, the aim is to restructure the state by placing segments of very large groups into multiple territorial compartments, thereby diluting the power that can derive from control of a single large unit. For still others, devolution is designed to separate ethnic antagonists. So, one strategy typically involves delegating power to minorities; another entails proliferating units controlled by majorities or large pluralities, diluting their aggregated power; while a third enhances the power of those, majorities or not, who find themselves in control of new units.

All these categories could be further decomposed, because the occasions for the decision to devolve or to retain a preexisting devolved form are country specific. What they have in common is a general proclivity to focus on existing problems more than the totality of likely consequences.

Occasionally, federalism or devolution may not be a choice at all but an arrangement inherited, generally from a colonial regime or an indigenous imperial regime.[4] These arrangements were difficult to revoke, although some regime leaders might have preferred revocation if only they could start over. They simply found it convenient to retain what was familiar or to give some acknowledgment to an obviously wide ethnic heterogeneity, albeit sometimes without much enthusiasm. *Force majeure* is not usually the best source of firm commitment.

There is, however, one matter that is almost always given serious attention in advance: the future relation between the central government and the devolved units. The respective powers of each are sometimes spelled out in considerable detail in the instruments formalizing the act of devolution. A matter that, on the other hand, tends to be relatively neglected is what,

[4] Canada, India, Malaysia, and Pakistan are among those in the former category; Ethiopia and Russia are in the latter.

exactly, will characterize ethnic group relations inside the devolved units. Serious problems can arise from this neglect.

The Competition-and-Choice View

Many contemporary theorists of federalism or regional autonomy, at least those who are not focused on problems of ethnic conflict, think of federal systems in very different terms from decision-makers focused on devolution to alleviate an ethnic problem. They think of devolution as facilitating competition and choice. Units in a federation are able to offer divergent policy mixes on a competitive basis, and those individuals or firms preferring the policy package or the more efficient service provision offered by a particular unit may choose to relocate there. This possibility gives more meaning to the choice of where to live. While competition of this sort might risk so-called races to the bottom and the growth of interregional disparities, inter-unit competition is generally associated with greater efficiency.[5] Excessive centralization can also be countered by placing policy authority at lower levels, where divergent needs and preferences can best be met.

Of course, these goals—competition, exit, and subsidiarity—assume, contrary to the founding conditions of many federations, that people and capital are not tightly attached to the units that form the federation and so have the proclivity to be mobile when policy preferences demand it. Attachments to territorial units, especially ethnic attachments, might render these functions less applicable to severely divided societies, except insofar as preferences for specific ethnic policies are implicated. If they are, devolution to address ethnic problems may give rise to a different species of exit: departure of groups disadvantaged by the ethnic policy mix of a given unit or attracted by the mix of a different unit. Creating new units often results from discontent with a regional policy mix or an ethnically heterogeneous population mix that some groups find uncomfortable or disadvantageous to their ambitions. In Chapter 5, I shall describe a case of mass migration by a group as it sought to escape from ethnic domination in its previous home. If settled populations

[5] See Ilya Somin, "Foot Voting, Federalism and Political Freedom," in James E. Fleming and Jacob T. Levy, eds., *Federalism and Subsidiarity*, *NOMOS LV* (New York: New York University Press, 2014), pp. 83–119. For the benefits of inter-unit competition in service provision versus the growth of interregional disparities as a possible consequence of devolution, see, e.g., Andrés Rodríguez-Pose and Roberto Ezcurra, "Is Fiscal Decentralization Harmful for Economic Growth? Evidence from OECD Countries," *Journal of Economic Geography*, Vol. 11, no. 4 (2011), pp. 619–43; Rodríguez-Pose and Ezcurra, "Does Decentralization Matter for Regional Disparities? A Cross-Country Analysis," ibid., Vol. 10, no. 5 (2010), pp. 619–44.

do become footloose because they are attracted or repelled by the ethnic policies of particular units in a federation, that ability to move might at least spare those populations continued discrimination or worse. Some such migrating populations, however, find alternative destinations equally unwelcoming.

As I said, the original justification of federalism in *The Federalist Papers* presupposed the attachment of people to the units in which they lived.[6] That may have changed in some Western countries, not least the United States itself, but some *Federalist*-inspired functions remain relevant regardless of these changed conditions.

Hypothesized Functions and Benefits for Coexistence

The reasons that groups seek territorial devolution or that governments do so are not necessarily identical to the functions subsequently performed by devolved institutions. Nor are the functions necessarily identical to the reasons that central governments acquiesce to demands for devolution. As I use the term, *functions* refer not to intentions but to beneficial effects on ethnic relations that could be anticipated because of changes in territorial boundaries. Sometimes these functions are performed; sometimes not.

There are at least nine ways in which devolved institutions—and here I mean specifically the existence of sub-state territorial units holding significant governmental power—might have benign effects on ethnic conflict.[7] Some of these effects involve providing satisfactions at one level of government that are unavailable at others. Others entail restructuring of cleavages, interests, relationships, and alliances, based on what we know about the relations of ethnic identity to territorial boundaries and the shifts in the saliency of various levels of identity to changes in those boundaries.[8]

The varied character of these functions is predicated on the divergent starting conditions of states in need of devolution, conditions that might benefit from an assessment of what they need and what they can get out of a revised relationship between ethnicity and territory.[9] It is important to stress again

[6] See the excellent treatment, spanning ethnic and nonethnic justifications, by Jacob Levy, "Federalism, Liberalism, and the Separation of Loyalties," *American Political Science Review*, Vol. 101, no. 3 (2007), pp. 459–77.

[7] In this section and the first part of the next, I am borrowing a few points from my former self. See Donald L. Horowitz, "The Many Uses of Federalism," *Drake Law Review*, Vol. 55, no. 4 (2007), pp. 953–66.

[8] See Donald L. Horowitz, *Ethnic Groups in Conflict* (Berkeley: University of California Press, 2000), pp. 64–74.

[9] For the diversity of conditions, see Yash Ghai, "Ethnicity and Autonomy: A Framework for Analysis," in Ghai, ed., *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States* (Cambridge: Cambridge University Press, 2000), pp. 1–26.

that the devolving political authorities do not always think of the matter in this way and do not always anticipate or desire the functional results. Rather, the most frequent of the motives canvassed earlier are more general: to anticipate, solve, or ameliorate some dangerous manifestations of ethnic conflict by giving some local authority to a discontented group or, less commonly, to transform ethnic conflict at the overarching national level by creating separate compartments that militate against national-level expressions of conflict by a few large groups acting in concert. Because levels of ethnic identity and relationships to members of other groups are both sensitive to changes in the territorial context, attempting to achieve these aims by devolution may activate one or more of the functions we are about to explore.

The functions that are enumerated here are those that *might be* performed. Yet it is hardly inevitable that these functions will be performed; and even if they are, their benign effects may be outweighed, sometimes far outweighed, by additional consequences that devolution brings in its train.

Nine Functions

First, devolution can facilitate the production of divergent political outcomes at various territorial levels, an important function in heterogeneous countries.[10] In *Federalist* no. 51, Madison asserted that the powers possessed by state governments would "guard the society against the oppression of its rulers" and also "guard one part of the society against the injustice of the other part."[11] Madison was referring to majorities and minorities, and he sensed that placing majorities and minorities in multiple jurisdictions would make it difficult for cohesive majorities and minorities to form at the national level, so that the rights of the minority "will be in little danger from interested combinations of the majority."[12] In both of these aims, Madison was perhaps too sweepingly optimistic, but under certain conditions reductions in some of the dangers he apprehended have been achieved.[13]

[10] Josep M. Colomer, "Equilibrium Institutions: The Federal-Proportional Trade-Off," *Public Choice*, Vol. 158, nos. 3–4 (2014), pp. 559–76.

[11] *Federalist* no. 51, in Shapiro, ed., *The Federalist Papers*, p. 265.

[12] Ibid., p. 266.

[13] We shall see later that certain federal configurations can indeed reduce minority oppression at the national level. Under certain circumstances, federalism can also protect against autocracy at the national level. See Robert R. Kaufman et al., "Federalism and Democratic Backsliding in Comparative Perspective," paper presented at the American Political Science Association annual meeting, 2022. A more vigorous federalist dispensation of provinces amalgamated into regions has been proposed to relieve Iraq's citizens of a highly centralized system in which positions and rewards are conferred by pre-set ethnic identification. See Liam Anderson, "Filling Out Iraq's Federation: A Bottom-Up Approach to Challenging the *Muhasasa*," *Ethnopolitics*, Vol. 23, no. 2 2024), pp. 173–92.

A different minority benefit at the devolved level can be identified. Units placed below the central government, whether those are called provinces, regions, or states, can allow a group that is a minority in the country as a whole but a majority in a sub-state unit to exercise governmental control in ways that would be foreclosed if the whole country were one undifferentiated territory.[14] This entails mitigation of the effects of majority rule at the center by empowering majorities in devolved units.

So, for example, in Malaysia, where Chinese comprise about one quarter of the total population and do not often exercise great power at the center, they nevertheless are a plurality in the state of Penang. The chief minister of that state has always been Chinese, and, despite the rough edges of ethnic relations there, there is a sense of a government responsive to Chinese interests in Penang.

Similarly, in South Africa after apartheid, the Democratic Alliance (DA) has governed the Western Cape Province and several municipalities for considerable periods since 2009. The party has members of many groups but disproportionately represents minorities, including whites, the large so-called Coloured population of the province, and the small minority of Indians. While the DA is well represented in the national parliament and has been included in a governing coalition there, its chances of ruling alone are slim, but its record of governing a major province is a sign that it is a major party and that minority interests have a claim on the attention of the provincial government.[15] The federal framework has provided a measure of minority satisfaction.

In Kenya, too, minorities—that is, smaller ethnic groups and also some larger groups whose chances of exercising power at the center were slim—favored devolution to the county level in the 2010 constitution, anticipating that it would allow those groups to govern themselves and, to some extent, limit the domination of the largest groups at the national level. Where groups are territorially differentiated, this is a very common function of federalism, and it can certainly mitigate, but not vitiate, a sense of minority exclusion at the central government level. An important point is that such regional power,

[14] See Somin, "Foot Voting, Federalism, and Political Freedom," pp. 100–01. Devolution to minority-dominated units is the type of federalism or autonomy most commonly associated with devolution in general and most commonly recommended by international bodies. See, e.g., the recommendations of the Council of Europe in 1993 and the Lund Recommendations in 1999, described by Hurst Hannum in "Territorial Autonomy: Permanent Solution or Step to Secession?" in Andreas Wimmer et al., *Facing Ethnic Conflicts: Toward a New Realism* (Lanham: Rowman & Littlefield, 2004), pp. 274–82. Such recommendations rarely take account of other forms and goals of devolution or the problems this type may pose for local minorities in a devolved region, a subject discussed below.

[15] The election of a white leader of the party in 2020, however, was widely thought to reduce the party's appeal to black African voters.

while not completely satisfying, may be thought sufficient to avert attempts to secede and may also mitigate disappointment following the loss of elections at the central government level.[16] In the best case, it may reduce the temptation to try to win national elections at any cost and so calm politics to that extent.[17]

In federal countries with separate state civil services, it is reasonable to expect that their ethnic composition may vary from one unit to another, as well as between the central government and the devolved units. To the extent that central government recruitment is an ethnically contentious matter, divergent composition should alleviate it. The same would be true for variations in language policy, especially for languages as media of instruction and authorized modes of official communication, and for numerous other policy choices, for which devolution might expand the policy menu.

Another aspect of divergent outcomes at the center and in the regions concerns the ability of opposition parties, whether ethnically differentiated or not, to control particular devolved units, thus sustaining themselves, creating disincentives to violent strategies of opposition, and checking the ability of a ruling party at the center to impose its will across the board. This democracy-preserving aspect could be considered a separate function of devolution altogether. Its desirability points to an important design criterion: units should not be so small that they cannot stand up to excesses of central control, an objection that has been raised in Kenya, where the 2010 constitution devolved power to 47 counties, many quite small. The greater the number of units, says L. Adele Jinadu, the stronger the central government is likely to be in relation to those units.[18]

Of course, it is also possible that devolution to relatively homogeneous units can create the opportunity to express ethnic grievances that raise the temperature of ethnic conflict at the level of the overarching state and, in extreme cases, can threaten separatism, even if secession is rarely achieved. Moreover, at the regional level, devolution can cause increased conflict if regional minorities do not fare well in competition with majorities in the regions or if regional majorities exclude others from benefits and opportunities available in the devolved unit. In regions where a large majority group can claim a homeland, whether or not officially recognized as such by the central government, minorities can be victimized as people whose claim to belonging in the unit is less secure than that of the majority.

[16] See Jean-Paul Faguet et al., "Does Decentralization Strengthen or Weaken the State? Authority and Social Learning in a Supple State," in Faguet and Caroline Pöschl, eds., *Is Decentralization Good for Development?* (Oxford: Oxford University Press, 2015), pp. 129–59.

[17] Ibid., p. 140.

[18] L. Adele Jinadu, "The Constitutional Situation of the Nigerian States," *Publius*, Vol. 12, no. 1 (1982), pp. 155–85, at p. 161.

These are, as we shall see, real possibilities that can have very serious consequences for group relations. They should not necessarily obscure the valuable compensatory and checking functions that devolution to areas controlled by groups that comprise only a minority in the overarching state can perform, but central governments need to find ways to avert or correct them. We shall pursue this point in later chapters.

Second, the existence of sub-state units can quarantine conflict within those unit boundaries.[19] Preventing the spread of dangerous conflict is a vital governmental function.

Following the 1963 creation of Malaysia, which was a federation even before independence, ethnic violence has tended not to spread from one state to another. Riots twice in 1964 were confined to Singapore, which was then in the Malaysian Federation; those in 1967 were confined to the state of Penang; and those in 1969 were mainly confined to Selangor state. The same has been true for intergroup violence in India, where state governments control the police.[20]

By contrast, in the Nigerian First Republic (1960–66), with only three major territorial units (and one much smaller one), every ethnic issue threatened to engulf the whole country and ultimately did, in the Biafra war of 1967–70. In the three subsequently restructured Nigerian Republics, with a larger number of states, many ethnic issues have become subnational issues, limited to one state at a time. The issue of Shariah or Islamic law, a delicate problem in a country so evenly divided between Muslims and Christians, has become a state matter, with various solutions in the several northern states. These solutions have not always been reached peacefully—far from it—but at least the disorder attending them has tended, to some degree, to be quarantined.

Issues of this kind are highly contentious, but the contention is focused on the governmental level at which power is lodged, and political losses do not always create grievances that spill across boundaries into other units or back to the center. Much depends, of course, on how issues emerge and where in governmental structures they reside, but quarantine does seem a serious benefit of devolution that can reduce conflict at the center.

Third, federalism or regional autonomy can make it possible to mitigate discontent by creating special (asymmetric) arrangements for regions with

[19] See Faguet et al., "Does Decentralization Strengthen or Weaken the State?" p. 143, for the point that errors at the local level can be corrected at the central level, whereas errors at the center tend to ramify. But, *per contra*, local governments are more easily captured by elites, a problem to which we shall return.

[20] See Steven I. Wilkinson, *Votes and Violence: Electoral Competition and Ethnic Riots in India* (Cambridge: Cambridge University Press, 2004).

special problems or distinctive identities.[21] In a widely read article, Alfred Stepan argued that what he called multinational—that is, ethnically plural—polities require asymmetrical federal arrangements, because they require collective rights for their constituent populations.[22] Other writers prefer symmetry among the units wherever possible. There is no doubt that asymmetric arrangements may be necessary in some cases, but not in all ethnically plural or even truly multinational polities.

Indonesia is not formally a federal state but one with a heavy measure of devolution to regions. In the case of Aceh, on the northern tip of Sumatra, it has been possible to devolve the power to impose Islamic law to the province without (so far) devolving that power to other subnational units.[23] Quebec's special identity has been recognized in Canada, albeit with difficulty. With its ethnically differentiated population and its different resource base from the rest of the country, Greenland, originally a Danish colony, was awarded home rule in 1979. This status allows the territory to exercise delegated powers without derogating from the sovereignty of the central government.

Asymmetric arrangements, with or without shared sovereignty, make special dispensations possible, but especially at the periphery, where groups are more likely to protest[24] and therefore signal the need for concessions to local sensibilities, than near the center of power, where special arrangements generate resentment among those neighbors who lack special provision.[25] Asymmetric arrangements may become problematic where the recipient group's attachment to the overarching state is frayed to begin with, as it was in South Sudan, the Atlantic Coast region in Nicaragua, Papua in Indonesia, and Eritrea in Ethiopia.

Much depends on how long dissatisfaction has persisted before devolution and how generous and genuine the devolved arrangements are. For distinctive groups on the periphery, satisfaction with autonomy is less likely to be

[21] For a sophisticated treatment of this technique in North America and Europe, see Karlo Basta, *Multinational Recognition, Majority Backlash, and Secessionist Crises* (Montreal: McGill-Queen's University Press, 2021).

[22] Stepan, "Federalism and Democracy."

[23] Several Shariah criminal punishments were introduced in Aceh in 2003, and a fuller Islamic criminal code was adopted in 2009, but the punishment of stoning was vetoed by the provincial governor. Caning, however, is a commonly administered punishment. In some cases, Islamic punishments have been administered to non-Muslims in Aceh, and they are probably administered commonly to nonconforming Muslims in that province. Restaurants are closed during the Muslim fasting month, and alcoholic beverages are difficult to find, even for non-Muslims.

[24] Graham K. Brown, "Regional Autonomy, Spatial Density, and Ethnoregional Protest in Contemporary Democracies," *Ethnopolitics*, Vol. 8, no. 1 (2009), pp. 47–66, at pp. 56–57.

[25] For cases involving asymmetric relations, see Yoram Dinstein, ed., *Models of Autonomy* (New Brunswick: Transaction Books, 1981).

achieved if preceded by extensive warfare, as in South Sudan or Bougainville in Papua New Guinea. Since Sudan's independence in 1956, rebels from the southern region had been at war with the central government, on and off, for decades before it opted for independence in 2011. Bougainville had experienced a decade of violence, from 1988 to 1998. For regions with this history, autonomy may be insufficient to overcome accumulated resentment. The timing of devolution, I shall argue later, has major consequences.

Furthermore, whatever satisfaction with the arrangements is achieved initially may decline over time, and the center itself may also tire of catering to the special status of asymmetric regions, especially if that status was awarded reluctantly in the first place. In such cases, the center may take the initiative and revoke the autonomy, as Ethiopia did when it abolished Eritrea's federal status and absorbed the territory into the unitary state in 1962, as Serbia did for Kosovo, as Cameroon did with the Anglophone Cameroons region that had joined the larger state after a referendum, and as Indonesia has reneged on its commitments to Papua.[26] As I mentioned earlier, Malaysia, too, has reduced its asymmetric commitments to the two Borneo states that joined the federation in 1963. Governments accustomed to symmetric arrangements do not respect asymmetric ones, absent what they take to be a strong showing of need for them, at relatively low cost to the center.

Satisfaction may also decline in the devolved region, even in thoroughly democratic states—witness the rising sentiment for independence among Greenland's Inuit population, or in French Polynesia and Corsica, or in Scotland, or in Catalonia, among others. Those who demand asymmetric federalism are frequently those who are most weakly attached to the overarching state, so the arrangements are vulnerable to attempts on either side to dissolve or radically alter them, and relations with the center will commonly be fraught—unless, of course, the region knows that it needs the protection of the center from external threats or understands that it is unable to be self-sufficient. Discontent may not ripen into a successful secessionist movement, but there is often an abundance of separatist sentiment and conflict with the center.

Asymmetric arrangements are frequently recommended for averting ethnic secession or for merely recognizing divergent ethnic lifestyles and policy preferences by granting extensive regional powers. The record, however, is decidedly mixed. There are some notable long-term arrangements, some

[26] We shall discuss these cases in later chapters. For the vulnerability of asymmetric units in otherwise unitary states to recentralization, see Liam Anderson and Carlos Costa, "Survival of the Fittest: Explaining the Success of Ethnic Autonomy Arrangements," *Swiss Review of Political Science*, Vol. 22, no. 4 (2016), pp. 516–44.

crafted in cooperation with the neighboring country most concerned. The arrangement for the Alto Adige, discussed later in this chapter, is one. Another concerns the Åland Islands of Finland.

The islands, inhabited by Swedish speakers, have benefited from a long-standing, very complete, carefully constructed, and generous devolutionary regime. Among its features have been firm guarantees for the Swedish language, limitations on property sales to non-residents, and provisions that discourage migration of non-Swedish-speaking Finns to the islands, provisions that might, if the islands comprised a larger portion of the total state population and area, raise serious problems of discrimination and limitations on opportunity. All of these stabilize the composition of the population and serve to dampen apprehensions about impending minority status by virtue of proximity to an ethnically differentiated, large majority. Other provisions accord the islands some voice in Finnish national policy and the ability to submit initiatives on such matters. In every way, the incentives for dissatisfaction have been greatly reduced. Generosity is likely to be reciprocated.[27]

The Åland Islands plan was agreed very early, in 1920,[28] at a time when "self-determination" and satisfaction of minorities were very much in the air. A different but also carefully constructed regime by Denmark for the Faroe Islands also appears to have thwarted periodic movements by islanders for independence, but not necessarily forever.[29]

By no means can it be said that any universally applicable formula exists for mutually satisfying asymmetric devolution. Special arrangements for territories near the center may provoke resentments among those not so privileged. On the other hand, territories that appear to be the neediest candidates, because of their distance from the center or their strong ethnic differentiation, may also be those for which asymmetric devolution is most likely to fall short of accommodating conflicts with the center. For these reasons, asymmetric devolution will usually be a gamble, very often an unavoidable one if the problems it is designed to cope with have been allowed to accumulate over time. We shall discuss this further in connection with prospects for ethnic power sharing at the devolved level.

[27] See, e.g., the special arrangements for the Portuguese Azores and Madeira, which include the power to negotiate international agreements on matters important to the welfare of the islands. Rui Tavares Lanceiro, "The International Powers of the Portuguese Autonomous Regions of Azores and Madeira," Instituto Ciéncias Juridico-Políticas, Lisbon, 2010.

[28] This account rests on the description of Ruth Lapidoth, *Autonomy: Flexible Solutions to Ethnic Conflicts* (Washington, DC: USIP Press, 1996), pp. 70–77. Among the many virtues of that volume is the completeness of the material provided for each of the autonomy regimes described in it.

[29] For details, see ibid., pp. 112–15.

Fourth, in ethnically heterogeneous states, regional government provides a site at which politicians of various groups can encounter each other, become familiar with each other, engage in bargaining, and learn about the needs and aspirations of groups other than their own, before they rise to the national level, where more complex and delicate issues of ethnicity and national policy may need to be resolved. Heterogeneous regions provide opportunities for interethnic political socialization of elites.

Olimpija Hristova Zaevska, who has studied ethnic politics in devolved municipalities of North Macedonia after the Ohrid Agreement of 2001, finds wide variation in patterns of interethnic political cooperation between the Macedonian majority and the Albanian minority.[30] In some local councils, especially where the territorial boundary of the council was uncontested, there are high or, more commonly, intermediate levels of cooperation across group lines to achieve local goals and to calm tensions that arise. In other municipalities, however, where the Albanian population approaches 50 percent, the two major Macedonian ethnic parties that are political enemies at the national level cooperate to prevent Albanian hegemony at the municipal level. Overall, it seems clear that where local traditions of cooperation are present, politicians tend to build upon them in the work of the councils.[31] Macedonia's previously established but informal practice of interethnic coalitions in the central government suggests that lower-level cooperation might prove helpful for politicians who eventually move up, but the arrangements in municipalities are ad hoc and highly variable, rather than institutionalized by agreements.

A different study of North Macedonia's local councils by Kristina Dimovska also finds wide variation in what we might call informal power sharing at the municipal level.[32] Larger towns, those with a history of involvement in the 2001 insurgency that led to the Ohrid Agreement, and those with high levels of socio-economic differentiation between groups appear to have gone furthest in interethnic cooperation among leaders. Where it exists, cooperation extends mainly to sharing patronage opportunities on an equitable basis, especially in local government employment,[33] and a general desire to avert violence.

[30] The Macedonian changes were denominated as decentralization, but the limited powers devolved resembled those granted in some regional autonomy programs.

[31] Olimpija Hristova, "Decentralization and Types of Inter-Ethnic Cooperation: Comparing Multi-Ethnic Municipalities in Macedonia," paper presented at the DISC Workshop "Status Quo Vadis: Political Institutions in Divided Societies," Central European University, May 9–10, 2013; Hristova, "Hate at Central—Love at Local," unpublished paper, Skopje, March 9, 2013, www.analyzingeurope.com.

[32] Kristina Dimovska, "The (Non)Equitable Representation of Ethnic Minorities in Decentralization in the Republic of Macedonia," paper presented at the meeting of the Association for the Study of Nationalities, Budapest, June 14, 2014.

[33] Where employment rolls seem to be bloated, as they are at the central government level because of civil service patronage quotas laid down at Ohrid.

As the Macedonian example suggests, mutual accommodation is not necessarily the uniform experience in heterogeneous units. It seems more likely to occur where the unit is well established and understood to be an indivisible territory than where groups have simply been placed together in a new unit. Macedonia's municipal-level interethnic accommodation may proceed on the basis of local exigencies, to some degree independently of national-level politics, and the experience may or may not transfer well to politics in the central government.

Training in compromise and mutual accommodation is important in divided societies. The potential of federalism or regional autonomy for political socialization in multiethnic countries may be underappreciated, as is the general ability of certain institutions to foster the development of human capital among politicians.[34] Compromise does not always come easily to politicians who represent different groups, typically organized in parties that need to pursue the demands of those groups. We shall revisit the theme of interethnic cooperation within devolved units in discussions of interethnic power sharing in Nigeria below.

Devolved units that are heterogeneous can, then, be arenas for the development of skills in interethnic political action, but whether and how they fulfill this promise is uncertain. They might equally be arenas for the pursuit of conflict.

Fifth, division of a country into subunits can create incentives for political actors to see at least some issues in terms of competition among those units, rather than among ethnic groups. Consider a country, such as Nigeria or Myanmar, with resource-rich and resource-poor regions. Resource-rich regions are likely to argue for policies that apportion revenue from resources according to the principle of derivation (revenue should be returned to the place in which it originated), while resource-poor regions are likely to argue for policies apportioning revenue proportionately by population. If resource-rich units and resource-poor units do not coincide with particular ethnic groups, then this argument over revenue will cross-cut ethnic divisions and create allies out of members of groups that may otherwise be antagonistic and opponents out of members of groups that may otherwise be united.

[34] For the general benefits of citizen participation and learning at local levels, see Faguet et al., "Does Decentralization Strengthen or Weaken the State?" pp. 148–52. For an argument about the possible role of a distinctive constitutional process in developing human capital among politicians, see Donald L. Horowitz, *Constitutional Processes and Democratic Commitment* (New Haven: Yale University Press, 2021), pp. 19–30.

One of the oldest hypotheses in ethnic conflict studies suggests that cross-cutting cleavages mitigate ethnic conflict.[35] A major problem in severely divided societies is that it is very difficult to arrange deliberately for cross-cutting cleavages to present themselves. Divisions are often severe because they overlap and reinforce, rather than cross-cut, each other. Federalism, however, may inadvertently do what ethnic-accommodation engineers cannot otherwise do.

Since the proliferation of states in Nigeria, from 1967 to 1996, state governments in Nigeria have lined up against each other on a variety of cross-cutting issues. There have been disputes between units that argued for revenue apportionment by population and those that argued for apportionment by state of origin with respect to oil.[36] They have also played an important part in countering excessive centralization, by joining together to oppose central government intrusions into matters constitutionally confided to the states, such as supervision of local governments, basic education, public housing, and agriculture.[37] Most of these matters also cross-cut ethnic differences, although some may be contentious within states.

Similar conclusions have been drawn about the contrast between Canada and Belgium (and perhaps Spain could be added), on one side, and Switzerland, on the other. Canadian and, especially, Belgian federalism, it is sometimes asserted, would be less prone to ethnic conflict if it were based on a larger number of provinces per group, as Swiss federalism is,[38] for that would create greater opportunity for the expression of cross-cutting cleavages.[39] More about the advantages of a multiplicity of units later.

Sixth, because groups have multiple levels of identity, federalism may activate subethnic cleavages that drop conflict down to the subnational level from the national level or, to put it differently, from the intergroup to the intragroup level.[40]

Before India's reorganization of states along linguistic (ethnic) lines in the 1950s, the undivided state of Madras had a high level of conflict between Tamil speakers and Telugu speakers. The reorganization partitioned these

[35] See, e.g., Seymour Martin Lipset, *Political Man: The Social Bases of Politics* (Garden City: Free Press, 1960); Robert E. Goodin, "Cross-Cutting Cleavages and Social Conflict," *British Journal of Political Science*, Vol. 5, no. 4 (1975), pp. 16–19.

[36] Burmese minorities from different states have had similar discussions concerning natural resources as they planned for a future democratic federal dispensation.

[37] Rotimi Suberu, "Federalism in Africa: The Nigerian Experience in Comparative Perspective," *Ethnopolitics*, Vol. 8, no. 1 (2009), pp. 67–86, at pp. 76, 78.

[38] With the exception of Ticino, the Italian-speaking canton.

[39] Vernon Bogdanor, "Forms of Autonomy and the Protection of Minorities," *Daedalus*, Vol. 126, no. 2 (1997), pp. 65–87.

[40] See Anderson and Costa, "Survival of the Fittest."

two groups by placing Telugus in Andhra Pradesh and Tamils in Tamil Nadu. The structure of cleavages changed dramatically. In Andhra, for example, with Tamils absent, conflict took place among three intra-Andhra territorial groups, Telanganas, Coastals, and Ryalaseemas, and among several powerful landowning castes, especially Kammas and Reddis.[41] Eventually, Andhra was split again, this time along regional lines, between Telangana and the Coast.

Politically relevant group identities are malleable. One stimulus to which they respond is the territorial context. All else equal, the smaller the territorial context, the lower the level of politically salient identity. To put the matter crudely, if there are multiple territorial compartments, there are likely to be multiple subethnic differences that become relevant. Inevitably, the more of these there are, the more difficult it is for the whole country to be divided along a single overarching cleavage line. Decentralization in Uganda's districts, as in those of other countries, has stimulated an array of contests along local ethnic lines for leadership positions and patronage. While these may create serious new problems, they also help to prevent large-scale ethnic conflict at the level of the overarching state, which Uganda experienced during the first decades after independence.[42] As we shall observe, perhaps the same has been true, at least to some extent, as a result of devolution to Kenya's counties. It is important to emphasize, however, that the cost in violence and discrimination within some units, in Kenya and elsewhere, has been high.

One function of federalism, therefore, may be to create such ethnic and subethnic complexity as to reduce the level of conflict the whole country experiences. Countries, such as Tanzania, that have a large number of dispersed groups are generally not as conflict-prone at the national level as those with a few large groups that meet at the center of politics. In short, devolution can alter the political context in which groups see each other, search for allies, and scan for rivals. By changing the context, devolution can be a means of demobilizing (to some extent) former ethnic opponents at a previously undifferentiated national level by producing the equivalent of ethnic fragmentation.

Seventh, federalism can serve as a *de facto* electoral reform that reduces the ability of a large group to dominate the polity. Territorial boundaries serve to partition electorates, sometimes in ways that exacerbate ethnic conflict, sometimes in ways that reduce it.

The best example of this in both directions comes from Nigeria. After independence, the First Republic had three large regions (and soon a

[41] And in the successor Tamil Nadu state, intra-Tamil divisions also became more prominent.

[42] Elliott D. Green, "Decentralization in Uganda," *Conflict, Security & Development*, Vol. 8, no. 4 (December 2008), pp. 427–50.

much smaller fourth region). One of these, the Northern Region, contained about half the total Nigerian population. The Hausa-Fulani, about 30 percent of the Nigerian population but perhaps close to twice that percentage in the North, was able to gain control of the Northern Regional government by securing a large majority for its party, the Northern People's Congress (NPC), in the northern legislature and squelching most opposition activity from minority-ethnic groups in the North by a combination of patronage and denial of services to dissident areas. Using this strong position in the Northern Region as a base, the NPC was able to win a large plurality of seats in the national legislature and, with a junior coalition partner from the South, majority control of the whole country. Essentially, the large size of the Northern Region allowed its largest group, with only 30 percent of the total population, a springboard to national power.

During and after the Biafra war, Nigeria was re-divided, first into 12 and then 19 states, later into 21, 30, and ultimately 36 states. During the Second Republic (1979–83), the North alone was divided into 10 states of the 19. The Hausa-Fulani were able to control only six of these; the remainder were controlled by non-Muslim and Muslim (but not Hausa-Fulani) political parties, as well as a dissident Hausa party. The difference was that, with new state boundaries, the power exercised by the former NPC over the former, undivided Northern Region was limited to those states populated by genuine supporters of the successor to the NPC. And so, the proliferation of states changed the arenas which groups and parties could dominate. No longer could the Hausa-Fulani command the allegiance of groups now located in states outside their control. After the reconfiguration of federal units, the Hausa-Fulani were confined to something approximating a proportional share of electoral power, rather than the much greater than proportional share they had enjoyed previously by their influence over the undivided North. No longer could they dominate Nigerian politics from their disproportionately large northern base. In this sense, federalism amounted to an electoral reform.

Notice, too, that the creation of states in which Hausa-Fulani did not dominate reduced the element of bipolarity and tripolarity in Nigeria's ethnic conflicts. Whereas, previously, conflict lines were drawn among the three largest groups, so that the frame of conflict at the center was Hausa-Fulani against Igbo and Yoruba, both of them southern groups, or North versus South, the reduced coercive power of Hausa-Fulani produced a more complex set of alignments. North versus South remained an important cleavage line, especially in choosing presidents, where a practice of North–South

alternation was agreed, but it was no longer the only line, now that there was no automatic northern majority. The polity became more multipolar.

Kenya's devolution to 47 counties may yet have a similar effect, but its main contenders for power had not been relying to anything resembling the same degree on their command of a few large provinces to provide electoral bases from which to compete for power at the center. Their direct control of territory was more limited, and they have long made appeals to gather large coalitions beyond the core ethnic groups whose votes they controlled.[43]

Others have urged similar territorial divisions in order to produce more multipolar alignments. In Ethiopia, where homeland-based federalism was established, ethnicity has supplanted territoriality as an organizing principle for political parties, and astute observers have suggested that dividing a few large groups among several territorial units could produce more subethnic competition, which is to say more multipolarity.[44]

I shall suggest later that a recommendation to pursue a Nigeria-inspired policy of territorial multiplication may not be feasible. In Ethiopia, large groups—Oromo, Amhara, Tigray, Sidama, and Somali—and smaller groups as well have been granted large territories over which they preside and are likely to resist division of what they see as their legitimate homelands. I shall also show that the initial Nigerian creation of multiple states out of four regions was attributable to unique wartime conditions that make replication difficult if attachment of groups to current boundaries is felt to be advantageous.

Eighth, federalism can provide a stimulus for interethnic alignments and coalitions among multiple states.

Once the Hausa-Fulani could no longer govern Nigeria essentially alone, their political party was driven to seek genuine coalitions with other groups. (Certain incentives in the electoral system also pushed in this direction.) It is not coincidental that Nigeria is one country where a legal prohibition of ethnic parties has had some effect, as it is in the interest of groups that cannot get to a majority alone. If, then, federalism helps to proliferate groups and subgroups, or if it helps to confine the power of groups to less than a majority share, it will, all else equal, make it impossible for one group to control all of government through the democratic process. If that is so, and if

[43] See Elena Gadjanova, "Status Quo or Grievance Coalitions: The Logic of Cross-Ethnic Campaign Appeals in Africa's Highly Diverse States," *Comparative Political Studies*, Vol. 54, nos. 3–4 (2021), pp. 652–85.

[44] Yonatan Tesfaye Fessha, "The Original Sin of Ethiopian Federalism," *Ethnopolitics*, Vol. 16, no. 3 (2017), pp. 232–45, at pp. 238–39; Anderson and Costa, "Survival of the Fittest." For the same recommendation on different grounds, see Faguet et al., "Does Decentralization Strengthen or Weaken the State?" p. 153.

parties remain ethnically based, as they are likely to be in many countries, then it follows that incentives to form interethnic coalitions will be enhanced. Interethnic coalitions are much more likely to attend to the interests of multiple groups, especially if the coalitions are formed before elections,[45] and in this way to reduce conflict.

Devolution to multiple units appears to facilitate the creation of national parties or coalitions based on an array of lower-level affiliations, where smaller groups and subgroups are able to exercise power. Party competition at regional levels creates opportunities for aggregation of national-level majorities from regionally successful political parties and candidates. The national parties may still be ethnically skewed in one direction or another, but because they must take account of local alignments, they are likely to be more attentive to multiple group interests than they might be in a unitary state.

Ninth, federalism or regional autonomy may provide structures in which interethnic power sharing in the devolved units can occur more successfully than might be possible in the overarching state as a whole.

In many countries, as I have pointed out, there are too many ethnic groups to make the center of politics an object of serious contention based on ethnicity. Alternatively, because of a strong, overarching ethnic-majority identity, there may be few politically salient ethnic divisions at the national level. In either case, however, there may be specific regions that are subject to great conflict based on ethnic affiliations that find expression in those areas. Where that is the case, devolution to those regions may permit power sharing that could not have been achieved without delimitation of their territories as separate devolved units.

External support from a friendly neighboring government was undoubtedly an important source of the relative success of regional autonomy in the South Tyrol province of Italy, a territory of the Austro-Hungarian Empire until 1919. Inhabited by a German-speaking majority, an Italian-speaking minority, and a small group of Ladin speakers, the two major groups have, with considerable help from the Austrian and Italian governments, worked out a mainly consociational power-sharing arrangement.[46] Consociation is

[45] Meaning that the coalition partners will cooperate to seek votes across group lines, rather than merely divide cabinet seats between them after elections. The difference is that pooling votes creates deeper relations, because if the partners do not compromise on the interests of each other's constituents and cooperate in office following elections, the ability to pool votes at the next election will be greatly undermined.

[46] Albeit without a government consistently inclusive of all political parties. Stefan Wolff, *Disputed Territories: The Transnational Dynamics of Ethnic Conflict Settlement* (New York: Berghahn Books, 2003), pp. 114–50; Stephen J. Larin and Marc Röggla, "Participatory Consociationalism? No, but South Tyrol's Autonomy Is Evidence That Power-Sharing Can Transform Conflicts," *Nations and Nationalism*, Vol. 25,

based on agreed group guarantees, including a specified program of power sharing, rather than on incentives to encourage interethnic moderation and the formation of coalitions of the center across group lines.[47]

After World War II, Austria and Italy agreed to guarantees of equality and of language use and education, as well as ethnic proportionality in the civil service for what was the German-speaking minority in Trentino and South Tyrol. After a series of lethal attacks by rebels in the territory, a new autonomy statute, passed in 1972, shifted power to what had become the German-speaking majority in the province. The Italian minority was guaranteed certain reserved positions, proportionality in the executive and the civil service, autonomy in education and culture, and a suspensive veto that could precipitate a constitutional court challenge to any proposed bill asserted to contravene ethnic interests. The agreement has been updated periodically.

No doubt violence in the 1950s and 1960s, reflecting the discontent of German speakers, facilitated the 1972 agreement by serving as a warning of recurrent danger, as bouts of limited and controlled violence have done elsewhere. The protracted and generally constructive involvement of Austria also helped motivate Italian government action.

Needless to say, the relations of neighboring states are not always so friendly. If they are truly antagonistic, then regional autonomy may not be adopted or, if adopted, can go badly wrong, as it did in Gagauzia in Moldova after the Russian invasion of Ukraine in 2022.[48] We shall discuss these and other aspects of Gagauz autonomy later. For now, what stands out is an international impact as disintegrative in Gagauzia as it was facilitative in South Tyrol.

It certainly helped that the particular population juxtaposition of German and Italian speakers was unique to the Alto Adige region and not replicated widely in Italy, so demonstration effects were limited. These circumstances made it easy to operate on the basis of asymmetrical arrangements that could be adjusted as the neighboring parties saw fit. The discontent of Italian speakers, less well represented in the regional civil service, remains palpable, but surveys show that members of both groups believe ethnic cohabitation is

no. 3 (2019), pp. 1018–41; Andrea Carlà, "Peace in South Tyrol and the Limits of Consociationalism," *Nationalism and Ethnic Politics*, Vol. 24, no. 3 (2018), pp. 251–75.

[47] For the consociational approach to conflict reduction, contrasted with the centripetal approach, see the first two contributions to Andrew Reynolds, ed., *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy* (Oxford: Oxford University Press, 2002), pp. 15–54.

[48] The Gagauz have more affinity for Russia than does the mainly Romanian-speaking majority of Moldova. I discuss this further in the next chapter.

much less troublesome than it was previously.[49] South Tyrol embodies power sharing within an asymmetrical arrangement.

By contrast, the Nigerian experience of local power sharing has been without the need for formal asymmetrical arrangements or other involvement of the central government. Based on this experience, Laura Thaut Vinson has made a case for local power sharing as providing some protection from intergroup violence. In both Plateau and Kaduna states, Vinson has found that local government areas (LGAs) that practice regularized power sharing have lower levels of interreligious (Christian-Muslim) violence than do those LGAs that do not practice power sharing.[50]

The forms of power sharing on which Vinson focuses are varied. The most noteworthy, fixed shares of positions in government or rotation in offices, and ethnically mixed tickets that secure more support through intergroup vote pooling, were agreed voluntarily in the locality.[51] Fixed shares and its variant, rotation in office, are a consociational device, part of a regime of group guarantees. Ethnically mixed tickets, which are not required but are an obvious choice for enlarging vote shares where a regional executive and a deputy executive must run for election as a unit, and therefore seek votes across group lines, are a centripetal strategy likely to enhance intergroup accommodation. Power sharing thus crosses the consociational–centripetal divide in Nigerian LGAs.

Vinson's carefully researched cases involve three LGAs where power-sharing agreements were consummated and three others where they were not. She shows that power-sharing agreements were consummated in LGAs where preexisting relations with Hausa-Fulani Muslims who had earlier migrated to non-Muslim areas were not hostile. In one such LGA, the preservation of non-Hausa majority status was insecure, giving rise to an incentive on the part of the insecure group to share power before it disappeared. In a second LGA, there had been a longstanding custom of intergroup compromise, and in a third LGA, the agreement was intended by two participating groups to exclude a third group. In fact, in two of the three cases, power

[49] For the unusually propitious conditions in South Tyrol, see Felix Schulte, "Toward a Multicausal Model of Successful Conflict Regulation through Territorial Self-Government: Lessons from South Tyrol," *Austrian Journal of Political Science*, Vol. 47, no. 4 (2019), pp. 33–43. For a less flattering view of the results in South Tyrol, see Carlà, "Peace in South Tyrol and the Limits of Consociationalism," p. 265.

[50] Laura Thaut Vinson, *Religion, Violence, and Local Power-Sharing in Nigeria* (Cambridge: Cambridge University Press, 2017), pp. 147, 154. The full discussion is at pp. 198–231. LGAs, with local elected councils, were created as a uniform third tier of government half a decade after the end of the Biafra war, in the decentralization reforms of 1976. In multiethnic local areas that were susceptible to conflict, ethnic representation on councils could be contentious.

[51] As Vinson says, "To be elected, the leaders have an incentive to maintain a united front." Ibid., p. 466.

sharing was not fully inclusive. (Non-inclusive power sharing is likely to exclude the least powerful groups.)

This is not to diminish the accomplishments in the three LGAs. Peace-preserving agreements are invaluable. But power sharing among all groups, including ethnic opponents, is much more difficult to achieve, even in such favorable conditions. Where preexisting intergroup relations are less favorable, and especially less peaceful, inclusive power sharing is even more difficult and still more difficult to consummate. Vinson's three control cases were characterized by poisoned ethnic relations, discriminatory practices, and/or conflicting claims to group ownership of a town. In none of them could a power-sharing arrangement be agreed, and in two of the three violence became recurrent.

It is worth noting that the three power-sharing cases were all multipolar in ethnic composition, whereas the three cases that lacked power sharing all had strong elements of bipolarity, mutual hostility, and zero-sumness, with an accompanying winner-take-all objective. With their background of conflict and strong disputes over the place of each group in the LGA, these were much harder cases than the generally more tranquil cases in which power sharing was agreed. As Vinson states, history was not determinative, but it hung over the atmosphere in each of these localities, doing great damage in the three cases of non-consummation.

It might be said, then, that where power sharing was most needed, it could not be accomplished. And where it was accomplished, it was sometimes achieved at the expense of third groups left outside the agreement. Such a conclusion does not diminish the utility of power sharing. It simply means that power sharing is hard to achieve, and inclusive power sharing is especially hard to achieve.[52]

Motives, Functions, and Structures

These are some of the *possible functions* that federalism might perform for the reduction of conflict in severely divided societies. In the main, these are mechanisms of conciliation. As I have already stated, these benign functions are not always performed, and in any case, they may be—and often are—inadequate by themselves to mitigate conflict.

[52] And often hard, too, without the strong encouragement of the central government, which in some cases of asymmetric devolution, most notably South Tyrol, has played a constructive role in shaping and reshaping arrangements.

Moreover, some of these functions may not be wholly consistent with others. Asymmetric federalism, in which different powers are devolved to different states, might, for example, impede the ability of states to group together cross-ethnically to mitigate ethnic conflict by forging alignments based on common interest apart from ethnic affiliation. Tradeoffs of this kind are to be expected. And, of course, whether these functions are performed, or performed without incurring offsetting costs, is another matter altogether.

A major tradeoff is one on which we shall focus considerable attention in subsequent chapters. It is perhaps most easily seen in Nigeria, where devolution has heightened the salience of group divisions and conflict within states and local government authorities, even as it has very definitely mitigated conflicts at the national level. As we shall see in considerable detail, the price paid in violence and damage to the life chances of large numbers of people has been very high for many years. Much the same can be said for groups disadvantaged within devolved units in a number of other countries that practice federalism or regional autonomy and have not found a way to reduce these human costs.

The balance of benefits and costs is by no means always clear in advance of the decision to devolve power. The design of devolved dispensations may not produce the anticipated results or do so at an acceptable price. Devolution, we shall learn, can be a risky strategy, with unanticipated consequences. Careful students of devolution have proposed features that might be optimized if particular devolved structural designs were adopted. What needs to be emphasized again is that the motives of national leaders for devolution, focused mainly on alleviation of certain kinds of disruptive grievances, are decidedly fewer in scope than are the functions that devolution might perform. Structures follow motives.

Only occasionally in scaling-down exercises is there grudging and often much-delayed acknowledgment of the need for asymmetrical powers of the kind that are more frequently agreed when scaling up is to be accomplished and new states are able to negotiate the terms of their accession to the federation.[53] Devolution of asymmetric powers is frequently ad hoc, in response to discontent threatening to erupt into what authorities see as "trouble." India has many examples of this, in which the creation of new states was at first resisted; and in India's Northeast we shall encounter the creation of new autonomous districts and regions, authorized by a schedule of the Indian constitution but with specific arrangements that vary from case to

[53] Among the new states that negotiated such arrangements are Sabah and Sarawak in Malaysia and and seven states in the Northeast in India, discussed in subsequent chapters.

case. In scaling-down devolution, moreover, many politicians prefer to grant power to quite low-level units, fearing that much larger units could facilitate secession. The functionality of these units is sometimes doubtful, but apprehensions can dictate design.

We shall encounter some of the functions enumerated here as we proceed in later chapters, and we shall have a chance to evaluate the hypothesized mechanisms. We shall also encounter design choices that have had some effect, benign or malign, intended or not, on ethnic conflict and on some of the functions enumerated here. There is no single optimal choice for the organization of devolved territory, given encrusted preferences, habits, and other constraints, including straightforward risk aversion. Occasionally, however, we can observe choices made possible by a change of circumstances or a change of policy, and we can note their effects on ethnic relations.

Along the way, as already intimated, dysfunctions as well as functions will appear. Many of these dysfunctions tend to be unanticipated or underestimated by the designers of devolutionary schemes, who perhaps succumb to a tendency to estimate benefits more highly than they calculate costs.[54] Although the costs of some of these dysfunctions are considerable, they are not necessarily easy to remedy.

Inhibitions on Devolution and Their Effects

Federalism and regional autonomy have had their specific attractions and obstacles in severely divided societies. As I have mentioned, the main attraction has been to reduce conflict by devolving governmental power to aggrieved ethnic groups that are territorially concentrated. Yet this course is quite often pursued reluctantly, even grudgingly, and sometimes not at all, even if the price of devolution could be relatively low and the ultimate cost of failure to devolve might be civil or secessionist warfare, as it was recurrently in Myanmar, the Philippines, Sudan, and Sri Lanka, in Indonesia before 1999, in Nepal before 2015, and in a number of other countries. If devolution were easy to achieve, there would be more federal states than there are and more regional autonomy, too. There are, however, obstacles to the adoption of federal arrangements, and most of these apply to regional autonomy as well.

These obstacles, some of which reflect antipathy toward the likely beneficiaries while others reflect risk aversion, produce hesitation, protracted

[54] For bias in cost–benefit analysis, see Bent Flyvbjerg and Dirk W. Bester, "The Cost-Benefit Fallacy: Why Cost-Benefit Analysis Is Broken and How to Fix It," *Journal of Benefit-Cost Analysis*, Vol. 12, no. 3 (2021), pp. 1–25.

negotiation, and backtracking, all of which tend to exacerbate hostility on the part of those demanding devolution. We have already discussed the main sources of reluctance to devolve power: the common desire of central governments to retain unrestrained power over all of their territory and resources; the sense that devolution can impair control of the state by an ethnic majority, particularly if power were to be devolved to an unpopular minority; and the fear that devolution can be conducive to ethnic separatism—meaning a diminution of central power in the region or trouble and disruption over that question—or separatist warfare, or even secession. Sometimes one, sometimes another, sometimes all of these motives can inhibit grants of power to ethnically differentiated groups at regional levels. Generally, it is when majorities are weak or regional discontent has grown significantly, most notably to the point where it might threaten the integrity of the state, that central government leaders are willing to accept ethnic federalism, especially any federal configuration that breaks up the majority into separate territorial units. Even then, many central governments prefer to fight rather than take risks with devolution.

Hausa-Fulani, who comprised a majority in the federal region of northern Nigeria, were persuaded to accept realignment of a federal structure that they dominated only because of the exigencies created by the Biafra war from 1967 to 1970. The Biafra secessionist insurgency, staffed with considerable numbers of ex-Nigerian military officers, was supported by France, which supplied it with weapons and intelligence, making it a dangerous movement. The government of Nigeria was supported by Britain and the Soviet Union, but it took that government two and a half years to defeat the secession.

Devolution was part of the central government's war strategy. Igbo in the Eastern Region were attempting secession after violent victimization in the Northern Region, especially in Hausa-Fulani areas. The Nigerian federal government used territorial adjustment as an instrument to enhance the loyalty of northern minorities in the armed forces and reduce the support of eastern minorities for Biafra, in both cases by creating minority-dominated states, not just in the North but also in what was then the Igbo-dominated Eastern Region.[55] In the North, new states were created to free Middle Belt, mostly Christian, minorities who were heavily represented in the Nigerian army from Hausa-Fulani political domination. Middle Belters had long demanded, in vain, the creation of a separate region or separate states, and their creation

[55] New states were also created in the Western Region, but not for the same purpose.

produced a sense of satisfaction. In the East, states were created to attract support from the eastern minorities and free them from the need to support the Biafra secession, led, as it was, by Igbo, who comprised the largest group—and the one whose domination was resented—in that region. These were exceptional actions, taken and commanding widespread assent only because of the need of the central government to win the war. Subsequent state creation in Nigeria did not have the same high threshold or the same rationale. It was easier to accomplish in ordinary times.

Warfare, which can signify majority weakness or threaten majority strength, is often the occasion for devolution, but not in the same way as it was in Nigeria. Rebels, more often than rump-staters or groups opposing the rebellion in the separatist area, receive devolution. As I mentioned, North Macedonia devolved local power to Albanian and other minority localities in 2001 after an Albanian insurgency exerted international pressure on the central government. Special autonomy for Aceh and Papua in Indonesia was conceded only after long rebellions, although in Papua the autonomy plan was undermined thereafter.[56] Sri Lanka's Sinhalese majority, on the other hand, elected to fight a very long civil war rather than concede serious autonomy. Sudan chose to fight two long wars before conceding autonomy and then independence to South Sudan through a referendum in 2011. Because devolution "leans against majorities," it customarily comes late, and usually too modestly, if at all, as we shall see in more detail soon. But that does not make it impossible.[57]

Another important, albeit only subsidiary, obstacle is that federalism and regional autonomy are not cheap. They involve duplication of facilities, functions, personnel, and infrastructure, including provincial capitals or at least regional governmental centers. These costs can escalate unforeseeably if demands proliferate for the creation of more and more state or sub-state units. In some countries, lack of administrative capacity at regional levels can preclude devolution.[58] Devolution also risks jurisdictional disputes and a particular subtype, disputes over jurisdiction to engage in corruption. In Indonesia, extensive devolution to new regions created multiple centers of authority to block commerce and new projects. Investors were stymied by

[56] Jacques Bertrand, "Autonomy and Stability: The Perils of Implementation and 'Divide and Rule' Tactics in Papua, Indonesia," *Nationalism and Ethnic Politics*, Vol. 20, no. 2 (2014), pp. 174–99. In Aceh's case, this was the second time special autonomy was granted. It was first conceded in 1959, after a rebellion, but then revoked by Sukarno in 1966. I discuss Aceh and Papua further in Chapter 3.

[57] Compare Liam Anderson, *Federal Solutions to Ethnic Problems* (London: Routledge, 2013), pp. 124–26, 130–33, on the reluctance of majorities to draw internal boundaries to maximize ethnic heterogeneity.

[58] As it did in nineteenth-century Italy. Daniel Ziblatt, *Structuring the State: The Formation of Italy and Germany and the Puzzle of Federalism* (Princeton: Princeton University Press, 2006).

multiple demands for permission fees, lawful and unlawful.[59] Devolution can be expensive in many ways.

The obstacles to devolution sometimes concern contested designs. In Myanmar and Nepal, as in Yemen, the appropriate number of units and their relations to group boundaries have long been contentious. In Sri Lanka, Sinhalese have been exceedingly reluctant to yield to the desire of Tamils to amalgamate the Northern and Eastern Provinces into a single region, because the Eastern Province contains large Sinhalese and Muslim populations, as well as Tamils. A merger of the two provinces might facilitate the feared secession of the merged unit, whereas an attempted secession of only the Northern Province, leaving Tamils in the Eastern Province behind, would be much less probable. Issues of this kind often prove exceptionally difficult to resolve.

Frequently, however, the obstacles are, as I have already intimated, more general. I touched on some of these in Chapter 1, in connection with adoption problems. In Asian and African states, where power is seen to be fragile, it is not generally regarded as appealing to give some of it away to lower levels of government, especially if they are dominated by ethnic strangers or opposition parties, or both—witness the reluctance of the Indonesian central government to fulfill all of its commitments to the autonomy of Papua or the increasing centralization of Nigerian federalism or of Malaysian federalism, to be discussed later.[60] Even in many established federations, there remains a sense that important decisions should be made at the center, especially if significant component states are controlled by opposition parties.[61]

One impediment to devolution can be truly overriding: the fear of central decision-makers that one or more newly created units may regard federalism or regional autonomy as the first step to secession and may misuse the devolved powers to pursue conflicts with the center and perhaps attempt to make good their exit. If power is nevertheless devolved despite these apprehensions, the configuration of devolution schemes sometimes attempts to minimize their chance of realization. The designs in Nigeria, Indonesia, and Kenya reflect these concerns.

[59] See Harold Crouch, *Political Reform in Indonesia after Soeharto* (Singapore: Institute of Southeast Asian Studies, 2010), pp. 100–01; Vedi R. Hadiz, *Legalizing Power in Post-Authoritarian Indonesia: A Southeast Asia Perspective* (Stanford: Stanford University Press, 2010).

[60] Francis E. Hutchinson, "Malaysia's Federal System: Overt and Covert Centralization," *Journal of Contemporary Asia*, Vol. 44, no. 3 (2014), pp. 1–21. The process of whittling down the special powers of the Borneo states began in the 1960s and accelerated in the 1970s. See Kai Ostwald, "Federalism without Decentralization: Power Consolidation in Malaysia," unpublished paper, University of British Columbia, 2017, p. 16. More on this process in subsequent chapters.

[61] See Ostwald, "Federalism without Decentralization," pp. 13, 20, 22.

Nigeria's proliferation of states divided the three largest ethnic groups in the country among multiple units. Unlike the former Eastern Region, which was the territory marked out to secede as Biafra, none of the current 36 states is a plausible candidate for secession by itself. There are some Igbo who pine for an independent Biafra, but divided as they are into multiple states, the dream seems futile.

Federalism was rejected in Indonesia after the fall of Soeharto. To be sure, considerable power and resources were devolved to the regions, but, with two exceptions,[62] the units receiving those powers were not the then-30 provinces but approximately 348 districts and cities that were rightly believed to be less capable of secession than much larger provinces would be. Despite the large population and dispersed island geography of the country, federalism was rejected by Indonesian leaders because of its association with a Dutch effort to defeat the Indonesian nationalist movement it was fighting in the 1940s by offering a federal state.[63] Instead, a multitude of small units was put into place in the early 2000s.

Kenya had a not dissimilar experience with federal proposals advanced by white settlers in the 1940s and 1950s.[64] In the 2010 Kenya constitution, a significant devolution bypassed the eight provinces, in favor of 47 counties, which would possess neither secessionist inclinations nor such capabilities. Like Indonesia, Kenya was a reluctant convert to regional autonomy, and in both devolved power went down to units deemed unthreatening.

Because secessions may be abetted by foreign powers, the international environment in the neighborhood of the proponents of devolution can certainly contribute to reluctance of the central government to devolve because of fear of secession. In the 1980s, the Gagauz minority in the South of the then-Soviet Republic of Moldova complained of a lack of cultural recognition and began to advocate the formation of a Gagauz Autonomous Soviet Socialist Republic. In 1989, the Gagauz unilaterally declared the creation of such a region, which the Moldovan government then vetoed. As Moldovan independence outside the former USSR became likely, the pro-Russian Gagauz "declared their own republic, which they claimed was separate from Moldova and would join a renewed Soviet Federation. The declaration greatly exacerbated tensions . . . . Violence was only narrowly avoided after Soviet troops

[62] In Aceh and Papua, provinces were approved as devolved units.

[63] Donald L. Horowitz. *Constitutional Change and Democracy in Indonesia* (Cambridge: Cambridge University Press, 2013), p. 71.

[64] See Robert Maxon, *Majimbo in Kenya's Past: Federalism in the 1940s and 1950s* (Amherst: Cambria, 2017).

intervened."[65] Eventually, the two sides negotiated, and in 1994 the Moldovan parliament approved a regional autonomy law for Gagauzia, but retained a high degree of central control, unlimited by any formal mechanism for dispute resolution between the center and the region.[66]

The Gagauz retain strong affinities with Russia and its post-communist regime, which the Romanian-speaking majority in Moldova does not share. The Russian invasion of Ukraine in 2022 proved to be extremely destabilizing for relations between the central government and the autonomous region. As Moldova's government took positions condemning the invasion, it also adopted a prohibition on Russian broadcasting in Moldova and a law prohibiting separatist activity, both of which Gagauz interpreted as an attack on their autonomy. The dispute between the region and the center was exacerbated by the European Union's award of candidate status to Moldova, also in 2022, over the objection of the pro-Russian (and often Russian-speaking) Gagauz. The cumulative result of these events was greatly increased polarization, high levels of protest against the central government, and the election of a pro-Russian governor of Gagauzia in 2022—all in the wider context of Russian Federation efforts to destabilize Moldova and the longstanding presence of the Russian irredentist state of Transnistria, with Russian troops, on Moldova's eastern border with Ukraine.

The Gagauz events illustrate both sides of regional autonomy decisions: why, on the one hand, central governments are reluctant to devolve power to regions that might attempt to secede and might be aided by another state (and, in the Gagauz case, might actually join that state) and why, on the other, central governments devolve power to separatists, in order to satisfy their aspirations short of secession. The sequence of events in the Gagauz cases is unusually clear on both points: reluctance to devolve, then devolution to alleviate conflict, followed by not-wholly-foreseeable disputes leading to an increased risk of secessionist and, on the Russian side, irredentist activity.

There is, however, a serious paradox inherent in the refusal to devolve. For a number of regimes that refuse to devolve power because they fear devolution will facilitate attempts to secede, such refusal stimulates the very separatism and, possibly, secessionist warfare they fear. We shall explore later the logic that leads regimes into this trap.

[65] Keith Harrington, "Gagauzia's Response to Russia's Invasion of Ukraine," ECMI Minorities Blog, European Centre for Minority Issues, Flensberg, Germany, April 6, 2023, p. 2, from which most of this account is drawn.

[66] Elisabeth Alber and Elena Ciujuclu, "The Autonomy of Gagauzia and Its Uneasy Centre-Autonomy Relations," IACL-AIDC Blog, October 19, 2023.

The Issue of Timing and the Price of Delay

The prevalence of the fear of secession highlights the importance of timing. Most national governments confronted with serious ethnic conflict initially resist devolution, believing it can provide "a back door to territorial partition or irredentism."[67] As a result, they often allow conflict to progress to a seriously disintegrative or violent stage, at which point it becomes a matter of the central government's grudging concession of powers that may be inadequate to persuade those in the affected region to end the conflict. Several excessively modest devolutions were attempted in Sri Lanka in the 1980s and 1990s, and the warfare raged on for a quarter-century until the Tamil secessionists were defeated in 2009. It also took more than a quarter-century for a major, but unsuccessful, devolution proposal by Morocco in 2007 to try to end the resistance of Polisario rebels to the Western Sahara's incorporation into Morocco, which had occupied the territory after Spain abandoned it in 1975. (The Morocco–Western Sahara proposals are another example of a scaling-down/scaling-up hybrid—from one point of view, devolution, but, from another, amalgamation of separate territories.)

The Western Sahara dispute underscores the tragic effects of the passage of time. Spain ended its colonial occupation of the territory in 1975–76, and Morocco immediately claimed sovereignty over it, despite the objections of the Polisario Front, which, supported by Algeria, had been waging a guerrilla war against Spain. Both Morocco and Mauritania invaded the territory as Spain left, but Mauritania abandoned its claim in an agreement with Polisario in 1979. The African Union accepted the Sahrawi Arab Democratic Republic as a member in 1982, but that Polisario-claimed republic did not control the territory.

Morocco's legal claim to the territory, which it backed with force and repression, was based on precolonial ties with the Sahrawi population.[68] These ties were recognized by the International Court of Justice in a 1975 advisory opinion but were found insufficient by the court to permit Morocco to claim sovereignty over the territory or to preempt the demands of the Sahrawi population for self-determination.[69]

Self-determination can take many forms, of course, including a freely accepted regional autonomy, which was what international bodies came

[67] Asli Ü. Bâli and Omar M. Dajani, "Introduction: From Revolution to Devolution?" in Bâli and Dajani, eds., *Federalism and Decentralization in the Contemporary Middle East and North Africa* (Cambridge: Cambridge University Press, 2023), pp. 1–14, at p. 9.

[68] See Abdeslam Maghraoui, "Ambiguities of Sovereignty: Morocco, The Hague and the Western Sahara Dispute," *Mediterranean Politics*, Vol. 8, no. 1 (2003), pp. 113–26.

[69] Western Sahara, Advisory Opinion, 1975 ICJ 12.

to endorse as a basis for negotiation after a long war between Moroccan forces and Polisario guerillas dragged on until a ceasefire was negotiated in 1991. After proposals from outside the region had been rejected by Morocco because they would allow a referendum on independence after five years of autonomy, and others had been rejected by Polisario because they would not allow such a referendum, Morocco finally produced a serious proposal of its own in 2007. (Polisario produced a proposal at about the same time.)

The Moroccan proposal was genuine. It envisioned a large measure of self-government for the Western Sahara, with its own elected regional parliament and head of government drawn from the parliament. But it contained omissions and ambiguities relating to regional taxing powers, sharing of revenue from lucrative mineral exploitation and offshore fisheries management, the precise mode of selecting the regional head, representation of the region at the center, the status of the numerous Moroccan settlers in the previously sparsely populated territory, and the resolution of conflicts between the region and the center. When the Moroccan government was queried on these issues, its response on many (but not all) was forthcoming, in a manner that indicated its earnestness for a resolution and its anticipation of further negotiations with Polisario and international interlocutors.[70]

Although the United Nations (UN) Security Council passed two resolutions in 2007 urging the parties to negotiate, and the UN envoy Peter van Walsum concluded in 2008 that independence for the territory was not an achievable goal, the matter was left unresolved. Morocco controlled 80 percent of the territory, Polisario 20 percent; and the conflict limped along under a ceasefire agreed in 1991, until Polisario declared in 2020 that the ceasefire was at an end because of Moroccan violations. Thereafter, low-level hostilities resumed.[71]

Despite the reasonable prospects for asymmetric regional autonomy based on an improved version of the Moroccan plan—and later the promising general provisions for elected regional authorities under the 2011 Moroccan constitution[72]—the conflict suffers from several problems endemic to many such conflicts—and a few distinctive ones as well. First, from the Polisario point of view, the imposition of Moroccan sovereignty was illegitimate *ab initio*, thus placing the territory in the same frozen and hard-to-thaw position as

[70] At the time, the US government was the main interlocutor. My knowledge of these details is derived from an unclassified paper and a response to the Moroccan government's answers to questions raised in that paper, both of which I prepared as an outside expert at the request of the US National Security Council in March–April 2007.

[71] The United States recognized Morocco's claim to the Western Sahara in December 2020.

[72] 2011 Constitution of the Kingdom of Morocco, arts. 135–46.

some other such conflicts around the world. Second, and most pertinent to the present discussion, the Moroccan proposal came very late and must have seemed to the Polisario and other Sahrawi as containing altogether too many ambiguities and possibilities of reneging after agreement. Third, following the Moroccan occupation of the most desirable, mineral-rich 80 percent of the territory, including the entire coastline, with its fisheries, several waves of Moroccan migrants had been encouraged to settle in the territory. These were highly qualified people to staff the civil service and professions, then skilled workers and prospective voters to assure a favorable result in a referendum that, in the end, was never held, and finally defectors from Polisario.[73] Moroccan migrants, who together greatly outnumber the local population, were often granted access to privileged positions and were heavily subsidized, creating resentment among Sahrawi and tension that periodically produced episodes of violence.

The result of these developments is that Polisario can scarcely assume that in an autonomous Western Sahara it will be the leading—or even a leading—political force. When the Moroccan offer was made, three decades after the Moroccan invasion of the territory, by which time migrants and their descendants comprised a large majority, a free election would not have been an attractive possibility for Polisario. It therefore remains in its base in Algeria and in control of the landlocked 20 percent of the territory not controlled from Rabat.

There are many grudging, ambiguous, limited devolution schemes that have been attempted at a late stage, and they are generally not well received by their intended beneficiaries. That is certainly the story of the Western Sahara. Caution in proposing regional autonomy often proves counterproductive.

Delay can also produce a very different, but equally dysfunctional, course of events. By the time devolution is considered seriously, conflict may have proceeded so far that the two sides agree, or are persuaded by international mediators to agree, that a great deal of authority must be vested in devolved units as a last resort. By this time, devolution is adopted merely to allow the contestants to live in separate compartments while inhabiting or purporting to inhabit a common central state. This is the case for Belgium's peacefully achieved federalism that increasingly resembles partition, and even more so the Dayton Accords for Bosnia, its two parts hardly forming a common

[73] Anouar Boulchars, "Simmering Discontent in the Western Sahara," Carnegie Endowment for International Peace, Washington, DC, March 12, 2012. See Jacob Mundy and Stephen Zunes, "Moroccan Settlers in Western Sahara: Colonists or Fifth Column?" in Oded Haklai and Neophytos Loizides, eds., *Settlers in Contested Lands: Territorial Disputes and Ethnic Conflicts* (Stanford: Stanford University Press, 2015), pp. 40–74.

state, and the federation proposed for Cyprus in the Annan Plan of 2004—30 years after the Turkish invasion that split the territory—and in subsequent iterations. All of them created (or in Cyprus would create) weak and easily deadlocked central governments. In the Cyprus case, deadlocks were so readily anticipated that provisions were incorporated in the settlement proposals for foreign judges to resolve them! Once intergroup conflict has become acute, the main aim of federalism or autonomy is simply to keep antagonists separate.

All of this suggests that earlier, in relation to the development of conflict, is always better. Because of the limited, sometimes semi-partitionist goals of federal arrangements contrived when conflict has already progressed very far, such arrangements may well yield rather discouraging results.

The passage of time may freeze a conflict, but it does not freeze the actions of the conflicting sides. If they are planning for a resolution, they are likely to take action to solidify their position before negotiations begin. If, on the other hand, accommodation of competing claims seems remote—and stalemate often makes it seem that way—that creates incentives to invest in reaping rewards from the status quo rather than anticipating changes. The more they do this, the less probable any compromise will seem. Morocco and Polisario both had long periods of rule in their own parts of the Western Sahara before 2007 and have had since that time. Under these circumstances, it is difficult to imagine the degree of risk taking that would be required to reunify the Western Sahara even under a liberal devolution regime.

If that is true of the Western Sahara, it can only be imagined how much truer it would be of more firmly legitimated status quo arrangements. Why should Serbs in Bosnia jeopardize their well-established federal unit, with its semi-partitionist position in the Federation of Bosnia and Herzegovina, in order to assist Bosnia in becoming a functional, multiethnic polity? If federation is intended to be the next best thing to partition, then it is hardly surprising that it results in an absence of cooperation at the center.

The passage of time thus involves much more than the *mere* passage of time. In the Bosnian case, developments in the years following territorial division created inhibitions on closer relations, and in the Western Sahara long delay created inhibitions on devolution and on acceptance when it was offered. Neglect of constitutional commitments for devolved power did something similar in Malaysia, where the federal government got used to revenue from oil and other natural resources and proved reluctant to restore the entitlements of two states on Borneo that, as mentioned earlier, had entered Malaysia on condition that they have powers not accorded to the states on

the Malay Peninsula.[74] The same proved true in Sri Lanka, when favoritism toward Sinhalese Buddhists had given rise to anti-Tamil discrimination and a separatist reaction. Reversing the Sinhalese privileged position was unattractive to those Sinhalese who had, in the meantime, developed ideological justifications for their superior place in the polity that might need to be seriously amended if the Tamil position were to change.[75] In all these cases, we are talking about decades of delay, which affect the prospects for the success of devolution. During those decades, conflict events have taken place that inevitably worsened relations between the regime and the group seeking devolution. Politicians at the center can become increasingly reluctant to devolve power to the very people they regard as responsible for disorder, violence, or even warfare and alignment with hostile foreign powers.

Under what conditions can devolution be adopted in the fraught context of intergroup conflict and after what may be long periods of hesitation and delay? Something depends on the intrusion of exogenous conditions related to timing. Changes of regime (Spain, South Africa, Indonesia) and the strategic exigencies of warfare (Nigeria, Bosnia, Somalia, North Macedonia) have made arrangements possible that had been foreclosed earlier and might be again if the opportunity were not seized. Constitution making at times of transition furnishes a propitious occasion for rethinking territorial arrangements. Even then, however, we shall see that those who design and negotiate plans for devolution are usually drafting on a slate containing a good deal of history that shapes what they are willing and able to propose and to implement.

[74] On central government reluctance to increase Borneo states' share of oil revenue, despite commitments to the contrary, see *Borneo Post* (Kuching), September 27, 2019, p. 1.

[75] As secessionist sentiment was growing among Tamils, the Sri Lankan government enacted a constitution that gave Buddhism, the religion of most members of the Sinhalese majority, the "foremost place" in the polity and required the government to "protect and foster the Buddha Sasana," the practice and doctrine of Buddhism. 1978 Constitution of Sri Lanka, as amended, art. 9. Most Tamils in Sri Lanka are Hindus, and there are also significant Muslim and Christian minorities, all of whom believed this and other provisions consigned them to second-class status. Unfavorable provisions in the constitution could only give a fillip to secessionist sentiment among Tamils.

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PART II

DEVOLUTION AND SECESSION

Risks and Causes

3
Federalism and Secession

Ethnic separatism is common; secession is rare. By that I mean that groups living in relatively compact areas frequently entertain ambitions of greater separateness from the central government, either in the form of devolved authority or outright independence. Independence, however, is seldom achieved. Many groups find ways to make their peace with central governments, either with or without devolution. Others attempt to leave, only occasionally by mutual consent and more often by warfare that is overwhelmingly unlikely to succeed, even after years of fighting.

One way that central governments attempt to placate separatist sentiment is, as we have seen, through devolution. Whether this is a wise choice is a contested question.

The literature on the macro-effects of devolution on ethnic conflict displays little agreement. The effects of federalism have been more studied than the effects of regional autonomy have been, but the studies of neither have reached consensus. The dependent variable is not uniform across studies. For some, it is the absence of violence; for a few, the attachment of minorities to the state; for others, a decline in conflict behavior; for still others, the persistence of democracy. Some studies find a benign effect of federalism on one or more variables, at least in democracies, some no effect (or no effect standing alone), some only a short-term effect or uncertain effect.[1] Some of the studies do not control for likely intervening variables; and one, by Zachary Elkins and John Sides,[2] wisely cautions that, because federalism is likely to

[1] For a variety of perspectives, see, e.g., Stephen M. Saideman et al., "Democratization, Political Institutions, and Ethnic Conflict: A Pooled Time-Series Analysis, 1985–1998," *Comparative Political Studies*, Vol. 35, no. 1 (2002), pp. 103–29; Hartmann, "Territorial Power-Sharing and the Regulation of Conflict in Africa"; Joel Selway and Kharis Templeman, "The Myth of Consociationalism? Conflict Reduction in Divided Societies," *Comparative Political Studies*, Vol. 45, no. 12 (2012), pp. 1542–71; Zachary Elkins and John Sides, "Can Institutions Build Unity in Multiethnic States?" *American Political Science Review*, Vol. 101, no. 4 (2007), pp. 693–708; Frank S. Cohen, "Proportional versus Majoritarian Conflict Management in Democracies," *Comparative Political Studies*, Vol. 30, no. 5 (June 1997), pp. 607–30; Dan Miodownik and Britt Cartrite, "Does Political Decentralization Exacerbate or Ameliorate Political Mobilization? A Test of Contesting Propositions," *Political Research Quarterly*, Vol. 63, no. 4 (2010), pp. 731–46; Thierry Madiès et al., "The Economics of Secession: A Review of Legal, Theoretical, and Empirical Aspects," *Swiss Journal of Economics and Statistics*, Vol. 154, no. 1 (2018), pp. 1–18.

[2] Elkins and Sides, "Can Institutions Build Unity in Multiethnic States?" p. 701. They take some precautions against endogeneity.

be adopted in states that have experienced widespread disaffection, that very starting condition is likely to limit any positive effect of devolution on the attachment of minorities to the state. Once again, late devolution may not be conflict reducing.

Nancy Bermeo points out, helpfully, that armed rebellion is more likely in unitary than in federal states.[3] "No violent separatist movement has ever succeeded in a federal democracy," she states.[4] It is conceivable, of course, that less conflicted polities are more willing to adopt federalism than are more conflicted polities, but since federal arrangements are more likely to be adopted when there is anticipation or experience of conflict (albeit adopted less often than they might be), Bermeo's findings are unlikely to be spurious or contaminated by endogeneity.

Arguments and Evidence

There is, however, a lively debate over the extent to which federalism, especially with units organized along ethnic lines, may contribute to separatism and even secession rather than to reduction of conflict in the undivided state. As I just mentioned, most students of devolution find it helpful in reducing violence and discontent among groups benefiting from regional power. For some, there are qualifications, such as whether devolution occurs before or after the onset of conflict,[5] or whether substantial functions are devolved,[6] or which functions are devolved under various conditions prevailing in the region receiving them,[7] but for others the overall judgment is that grants of power to regional ethnic groups generally produce satisfactions that reduce conflict.[8]

The principal argument concerns the power conferred on potential separatists by the creation of devolved institutions. On one view, federalism or

[3] Nancy Bermeo, "Conclusion: The Merits of Federalism," in Ugo Amoretti and Nancy Bermeo, eds., *Federalism and Territorial Cleavages* (Baltimore: Johns Hopkins University Press, 2004), pp. 457–82.

[4] Ibid., p. 480.

[5] Lars-Erik Cederman et al., "Territorial Autonomy in the Shadow of Conflict: Too Little, Too Late," *American Political Science Review*, Vol. 109, no. 2 (2015), pp. 354–70, finding that if autonomy is devolved after the onset of conflict, its palliative effect is conditioned on a measure of power sharing at the center, but not finding that autonomy fuels conflict.

[6] Schulte, "The More the Better?" suggesting that substantial devolved powers are required for a significant effect. Of course, the less likely the region is to attempt secession, as assessed in advance—that is, the better the starting relationship between the central government and the devolved region—the more generous the devolution is likely to be.

[7] Kristin M. Bakke, *Decentralization and Intrastate Struggles: Chechnya, Punjab, and Quebec* (Cambridge: Cambridge University Press, 2015).

[8] David Lublin, "Dispersing Authority or Deepening Divisions? Decentralization and Ethnoregional Party Success," *Journal of Politics*, Vol. 74, no. 4 (2012), pp. 1079–93; Saideman et al., "Democratization, Political Institutions, and Ethnic Conflict."

regional autonomy intensifies intergroup conflict and intragroup cohesion. The organizational capacity accorded to federal units can then be utilized by secessionists to make good their exit from the state. Ethnic federations, those based on mainly homogeneous units, are said to open the way to crises that consist of escalating demands against the power of the center, supported by protest and violence made possible by the autonomous institutions of the federal units.[9] In a more differentiated version, while devolution can mitigate conflict by allowing increased political participation in the regions, it may also encourage the growth of ethnic parties that reinforce group identity and provoke conflict with the center that can eventuate in secessionism. On this reading, devolution can increase the incidence of conflict and secessionist rebellion if ethnically differentiated regions are granted powers that significantly enhance their capacity and electoral control over the region.[10] The evidence, however, is far from supporting this view.

Much of the analysis relies straightforwardly on the enhanced position that devolution confers on its beneficiaries. What most theorists of devolution as a spur to separatism and secession do not contemplate in any detail is the precise situation of the recipients of devolution. By this I mean, first, their preexisting relationship to the overarching state that might impel them to attempt to secede or to be content with devolved status and, second, their capacity within that environment to make good their exit rather than refrain from attempting to do so. In fact, separatist inclinations usually precede devolution. There is, likewise, relatively little consideration of the ambivalence of central governments concerning devolution and the second thoughts (and actions) to which that ambivalence gives rise. This, too,

[9] Philip G. Roeder, *Where Nation States Come From: Institutional Change in an Age of Nationalism* (Princeton: Princeton University Press, 2007). Roeder, "States and Civil Societies Following Civil Wars," in Matthew Hoddie and Caroline A. Hartzell, eds., *Strengthening Peace in Post-Civil War States* (Chicago: University of Chicago Press, 2010), pp. 53–78, cautions against grants of autonomy after civil war, because, he suggests, autonomy is congenial to the recurrence of warfare. For a fuller discussion, see the special issue on "Segment States in the Developing World: Conflict's Cause or Cure?" *Ethnopolitics*, Vol. 13, no. 1 (2014).

[10] Dawn Brancati, *Peace by Design: Managing Intrastate Conflict through Decentralization* (Oxford: Oxford University Press, 2009); Brancati, "Decentralization: Fueling the Fire or Dampening the Flames of Ethnic Conflict and Secessionism?" *International Organization*, Vol. 60, no. 3 (2006), pp. 651–85. Most ethnic parties, however, in divided societies are formed early in the history of the conflict, which is to say before devolution occurs. A related claim is that ethnically based autonomous regions attract secessionists who seek (and win) office and then use the region to force a confrontation with the larger state of which it is a part. For a counter to Brancati's argument, see David Lublin, *Minority Rules: Electoral Systems, Decentralization, and Ethnoregional Party Success* (Oxford: Oxford University Press, 2014), pp. 225–91. Yet another version is that a "crisis of democratization" unleashes competing arenas and forces in the various federal units, and when the center loses control, "the republican base facilitates the process of secession." Carol Leff, "Democratization and Disintegration in Multinational States," *World Politics*, Vol. 51, no. 2 (1999), pp. 205–35. The Soviet Union is frequently cited in these debates, but it is doubtful that it was experiencing a crisis of democratization.

affects the propensity of the recipients to accept devolution or attempt to pursue an independent outcome. So do great variations in external support for what may become secessionist warfare, in which imbalances typically favor the central government. All of these are important determinants of the inclinations and capacities of putative separatists that the central government can affect by its hospitability or hostility to devolution and the consistency of its commitments. We shall discuss this further when we evaluate the effects of long delays, lack of fulfillment, and withdrawal of commitments previously made.

Many of the arguments against devolution were stimulated by the breakup of the Soviet Union, Yugoslavia, and Czechoslovakia and the consequent emergence of 26 independent states, most retaining preexisting federal boundaries. But to what extent were these new states the product of federalism or secession? Without recapitulating the extensive literature on these events, it is worth stating and examining some of the main accounts.

Valerie Bunce's nuanced treatment is based on the demise of what she calls a "regime,"[11] which is in line with the events of the time in the USSR and Yugoslavia. Bunce begins, but does not end, with the explanatory power of federalism for the new states that emerged from the dissolution of the old. She notes that unitary communist states, even if ethnically plural in composition, such as Romania and Bulgaria, did not break up, whereas the three communist countries organized in federal form did. Bunce emphasizes the power conferred on the subordinate units, which then produced conflicts between the units and the center. It was "an optimal environment for the republicanization of sovereignty"—that is, its consolidation in the republics that constituted the federal units—and the rise of ethnopolitics.[12] But for Bunce, that is not enough: the regime needed to collapse before the state could, and the delegitimation of communism played an indispensable part in facilitating state collapse.

The federal form in the USSR, Yugoslavia, and Czechoslovakia helped create some nations at the republic level or reinforced the national identity of those nations that already existed, but the most profound effect of the way these composite countries were organized lay in the creation of internal boundaries around putative or existing nations, whatever their degree of national identity and sentiment. In all three, the loosening of socialist regimes because of economic decline, leadership struggles, and elite conflicts over reform undermined the dictatorship and opened up opportunities for

[11] Valerie Bunce, *Subversive Institutions: The Design and Destruction of Socialism and the State* (Cambridge: Cambridge University Press, 1999).

[12] Ibid., p. 51.

fundamental change. That change took the form of empowering the republics and mobilizing at least some of their ethnic nationalities.[13]

That, however, is about as far as commonalities among the three communist federations can be pushed. From that point on, the trajectories of the three were very different, as we shall see in the next sections. In all three, new states emerged, but by divergent processes. In the Soviet case, an empire dissolved; and, as I show, several component republics, which had a common, longstanding grievance, used the unexpected occasion to make good their departure. The other Soviet republics had independence granted to them and generally kept closer relations to the former imperial power. In Yugoslavia, an attempt at more intensive democratization and a loosening of federal ties failed when a major actor, seeking central power, refused to cooperate, leading other republics to secede. Federalism alone had no causal role, except that the units attempted to depart whole, based on preexisting republic boundaries. And in Czechoslovakia, a similar issue—a strong federation or a looser one—divided the two parts of the state and led to their peaceful parting.

Looking back, then, at the dissolution of those three communist states, the general cautionary argument that federalism is conducive to secession does not explain the origins of the new states that emerged from them. In none of the three was federalism, or its structures, or the powers conferred by the center, or the ethnic parties it might encourage a sufficient explanation for these events, except for the preexisting boundaries within which their departure took, at least initially, with one additional exception: the facilitating power of the Slovak veto in Czechoslovakia, an integral part of the federal arrangement that I shall point to soon. But this aspect of Czechoslovak federalism plays no part in the general arguments about the overstated dangers of secession in federal states.

There were variations among the three communist regimes and among the republics within each. In the Soviet Union, Russians and Ukrainians were slower than some other groups to express nationalist concerns.[14] In Yugoslavia, the army was "the guardian of the state,"[15] whereas the Soviet and Czechoslovak armies had no such domestic duties—which helps explain why their transitions were much more peaceful. In Czechoslovakia, the Czechs were more fully in favor of a liberal economic regime than were the Slovaks, who were more inclined to a statist economy and a looser, more confederal

[13] Ibid., pp. 86–87.
[14] Ibid., p. 90.
[15] Ibid., p. 121.

state.[16] These differences made preserving the common Czechoslovak state more difficult.[17]

Bunce makes clear that Yugoslavia dissolved in "wars of secession," whereas in her view the Soviet Union and Czechoslovakia ended through processes of "peaceful partition," which was true in the latter but not altogether accurate in the former. The distinction between secession and other processes of regional disaffiliation is worth keeping in mind.

Philip Roeder is equally concerned with erosion of the center, but the scope of his ambition extends beyond events that occur during regime collapse or democratization, as well as beyond the three communist states. His focus is on ethno-federations more generally. Roeder contends that federations with ethnically differentiated units "increase the likelihood of escalating challenges to the common-state from alternative nation-state projects" by empowering "ethnic entrepreneurs who threaten the peace, the survival of democracy and the unity of the state."[18] These elites, who have "competing nation-state projects,"[19] make escalating demands for authority over more and more subject areas, and for more and more rents to distribute to their followers,[20] in order to enhance the elites' position. These demands lead to one of two alternatives in response: recentralization or disintegration of the common state. For him, there is no middle path; "escalation to nation-state crises is endogenous to these institutional arrangements."[21] Roeder is emphatic: "Ethnofederations and autonomy arrangements, unlike simple federations, also have a unique potential for the opposite form of breakdown—successful secession."[22]

Like other critics of ethnically differentiated federations, Roeder sees this form of federalism as expanding the capabilities of the units at the expense of the central government. Because ethno-federations create homelands, their governments legitimize divisive cultural institutions, with the result that "dual national identities"[23] emerge. By contrast, non-ethnically based federations do not support the creation of conflicting identities. The distinction between the two organizing principles of federalism is fundamental

[16] Ibid., pp. 90–91.

[17] Bunce depicts the division of Czechoslovakia as entailing a threat by the Slovak leader to separate, which was then embraced by the Czech leader, so that what was merely a threat became a resolution. Ibid., p. 97. We shall see later some nuances of difference deriving from other analyses of those negotiations.

[18] Philip Roeder, "Ethnofederalism and the Mismanagement of Conflicting Nationalisms," *Regional and Federal Studies*, Vol. 19, no. 2 (2009), pp. 203–19, at pp. 204, 206. Roeder makes similar points in the publications cited above, but this is a particularly concise and explicit statement.

[19] Ibid., p. 209.

[20] Ibid., p. 212.

[21] Ibid., p. 211.

[22] Ibid., p. 209.

[23] Ibid., p. 210.

for Roeder, and it leads him to draw great contrasts between them. He is, for example, unconcerned with the possibility that a majority or minority in a devolved but not explicitly ethnic federal or autonomous unit might make claims of the same kind as those he associates with explicitly ethno-federal units.[24] And he is not at all sanguine about the details of institutional engineering that might mitigate the dangers he identifies in ethno-federal units.

Whereas for Bunce the events that dissolved the three communist federations were exceptional, for Roeder they form illustrations of a much more general pattern. Above all, Roeder argues for the inevitability of secession or recentralization as the outcome of ethno-federalism and its struggles. Although his work was greatly affected by the demise of the communist regimes, Roeder extends the analysis to similar phenomena in other states that he identifies as ethno-federations.[25] His is ineluctably a general theory, with rather broad, even unqualified claims.[26]

Now it is true, of course, that federal or autonomous ethnically based units might facilitate the intact departure of a unit, without being a causal condition, by producing territorial boundaries within which movements can operate and establish successor states. And it is also true that it might sometimes be unwise to devolve power, because the recipients are already planning to use it to accomplish their departure from the state that grants it. The Tamil Tigers in Sri Lanka may very well have had such a plan in mind as they negotiated devolution during the Sri Lankan civil war of 1983 through 2009,[27] the perception of which was a principal reason the Sri Lankan government never agreed to a federal state in the later stages of negotiations. Wariness about secession is a safeguard against action that would facilitate it. Sometimes that wariness, we shall see later, is excessive and counterproductive.[28]

[24] As we shall see in great detail in Part III, this is no minor hazard of devolution, whatever the form.

[25] Not always with perfect accuracy. See Roeder, "Ethnofederalism and the Mismanagement of Conflicting Nationalisms," pp. 204, 213. Compare his astute observations about backlashes to certain asymmetric claims in ibid., p. 216.

[26] In an earlier, more circumspect article, Roeder pointed out that Soviet cadres "had a strong incentive to resist the articulation of agendas that might be subversive of existing federal institutions" and that adoption of "unsanctioned mobilization strategies" would and did result in their removal from office. Philip Roeder, "Soviet Federalism and Ethnic Mobilization," *World Politics*, Vol. 43, no. 2 (1991), pp. 196–232, at p. 206. He also distinguished between the more developed republics that were more strident in raising "banners of autonomy and sovereignty" and less developed ones that benefited from the center's redistributive policies and made clear that "cadres of more developed ethnic communities" were more prominent in mobilizing them, most of all in the three Baltic republics. Ibid., pp. 229, 231. This was a subtle analysis that lent itself to the distinction later made by others between republics that were and were not secessionist.

[27] I discuss these negotiations in Chapter 4.

[28] And may have been early on in Sri Lanka's negotiations.

Unpacking Secessions and Federalism

It is difficult to argue that ethnically based federalism or regional autonomy, by itself, weakens the bonds between units in a federation. In many cases, the bonds needed strengthening at the inception, which is why the federal form was chosen. Federalism does not generally produce separatism; more often, separatism produces federalism. There are more unitary than federal states, many with ethno-regional parties, and most secessionist movements occur in unitary states, just as Bermeo has stated.[29]

In what follows, I argue that to count the emergence of all or most of the new states that emerged from the dissolution of the Soviet Union as resulting from federalism is to conflate federalism with empire—even empire that takes a federal form—and to view secession as a straightforward consequence of the dissolution of empires. It is also to fail to acknowledge the absence in the Soviet case of the causal conditions asserted to foster secession: the empowerment of the units that comprised the ostensible federal structure.

In my judgment, and not mine alone, as I shall point out, the Soviet Union was not a federation but an empire in the same degree as the French or British Empire, despite the greater proximity of the peoples and territories the Russian and then the Soviet Empires had managed to acquire. No one asserts that the newly independent states of Guinea or Morocco had seceded from the French Empire upon its dissolution or that India or Ghana had seceded from the British Empire when it dissolved. They acquired independence from the dissolution of the whole,[30] which observers intuitively understand to be different from secession. I shall show that the same is true of most successor states to the union republics that comprised the Soviet Union.

In the aftermath of the Soviet dissolution, there were, however, some secessions, but where they occurred they invariably had causes that went beyond the events that characterized the dissolution. These we shall identify. That dissolution was, to be sure, a condition precedent to them, but only because the force of the central government would have been brought to bear against secession before the central government was faced with dissolution.

[29] For an extensive, albeit non-exhaustive, enumeration of movements spanning roughly the first 25 years of post-colonial independence across several continents, see Horowitz, *Ethnic Groups in Conflict*, pp. 230–81. A minority of these movements occurred in federal regimes or autonomous regions.

[30] Empires sometimes take a long time to dissolve completely. The French territory of New Caledonia in the South Pacific has held three referenda on independence, all decided in favor of continued association with France. If that result should change, it would not make New Caledonia a secessionist state for our purposes.

Of course, to distinguish secession from the results of dissolution alone requires a definition of secession. There are several different ways in which portions of a state may leave it and become independent states—partition of a federation or a unitary state into its component parts and expulsion by a central government of a constituent part are two such ways[31]—and a useful definition should exclude these different processes. More on these shortly. Secession involves (1) formal withdrawal of territory from an existing state, (2) initiated voluntarily by those seeking to withdraw, whether with or without the consent of the existing central government, and (3) intended to create a separate, independent state. This is not an especially stringent definition, and we shall soon see that it is sufficient to distinguish secession from other forms of withdrawal of territory that tend to have different causes, characteristics, and (often) consequences. It is also sufficient to distinguish secessionist states from those that emerge from the dissolution of empires.

Secession has been a relatively rare achievement in the world. There are, at any one time, many separatist and, at least ostensibly, secessionist movements in the world. And new states do emerge from time to time. Yet few secessionists actually succeed in making their exit from any state, whether unitary or not. From 1945 through 1989, only one new state, Bangladesh, emerged as a result of a secessionist movement, and the success of that movement was attributable to the willingness of the Indian government to commit its armed forces to the success of the Bangladeshi secessionists. Most neighboring governments are not willing to do the same.

Some, however, are willing to invade their neighbors' territory in order to acquire the territory or a resource within it or to pursue an irredenta, the retrieval of a kindred group and its territory in order to (re)attach both to the retrieving state. And under these circumstances, a movement to "secede" may be created in advance to legitimize the irredenta or the more straightforward aggression.

When Bangladesh left a federal Pakistan in 1971, it was not enabled to do so because of control of the devolved governmental apparatus of East Bengal. With per capita income half that of West Pakistan and with its governing bodies filled with West Pakistanis, it had a longstanding grievance against the central government. The only way in which federalism contributed to the secession was to convince Bengalis that their province was a victim of domination by the central government.[32]

[31] Another is retrieval through irredentism, but that does not generally produce an independent state but annexation or control by another state instead.

[32] See Horowitz, *Ethnic Groups in Conflict*, p. 242.

The precipitant of the secessionist movement was the refusal of West Pakistani authorities to recognize the victory of a Bengali party in national elections. Bengalis comprised a 55 percent majority of the Pakistani population. Their party, the Awami League, had been advocating autonomy within Pakistan, rather than enjoying any such autonomy, and certainly not pursuing secession. The repression of the Awami League and the arrest of its leader created the protest and violence that led to the armed rebellion of a guerrilla movement, the Mukti Bahini. The victory of the secessionists, however, was attributable to the willingness of India to intervene on behalf of the Bengali movement with the full force of its army against India's enemy, Pakistan. East Bengal's non-contiguity to West Pakistan was a major factor in the outcome. It is 1,250 miles from Islamabad to Dhaka. India's intervention blocked aid from reaching Pakistani forces from West Pakistan. This kind of decisive intervention is very rare, which is an important reason for the paucity of secessions.[33] If Bangladesh is any guide, regional incapacity despite federalism is more likely than regional capacity derived from devolved federal powers to drive secessionism.

Note that in labeling Bangladesh the sole successful secession from 1945 through 1989, I have excluded what was called the "separation" of Singapore from Malaysia in 1965. In fact, that "separation" was actually the result of expulsion from the Malaysian federation that had been created two years before. There had been serious friction between the leader of Singapore and the central government, which decided upon the expulsion; it was not the result of secession.[34] The expulsion of Singapore so soon after it joined the new Malaysian Federation marked a failure of unification, certainly not the voluntary departure of an established unit. It is worth noting that the authors who argue that devolution contributes to secession are, without exception, never referring to new, scaling-up federations that fail. In any event, the Singaporean case did not involve secession.

Another seemingly plausible candidate for categorization as secession during the 1945–89 period, the Turkish Republic of Northern Cyprus (TRNC),

[33] Ibid., pp. 272–77. India had special reasons to intervene. These were not confined to Indo-Pakistan hostility. Before the intervention, there had been a large outflow of Bengali Hindus from Bangladesh to West Bengal, which was difficult for India to handle and, had it persisted, could have had an impact on ethnic balances and ethnic politics in India.

[34] Gordon P. Means, *Malaysian Politics*, 1st ed. (New York: New York University Press, 1965), pp. 353–55. (I also have field notes of my own interviews confirming this conclusion.) There never was a secessionist movement in Singapore. See Lee Kuan Yew, *The Battle for Merger* (Singapore: Government Printer, 1961). Because the expulsion of Singapore was the result of problems in interethnic politics in a newly configured federation, it bears some resemblance to the dissolution of the mergers of the United Arab Republic, the British West Indies, and the East African Federation a few years earlier, a failure of unification or of what I previously called "scaling up." In this case, it was only a partial failure, as two Borneo states, which had joined with Singapore in 1963, remained.

was the result of a foreign invasion and continuing occupation, rather than any secessionist movement. The Turkish invasion of 1974 was ostensibly justified by Turkey's role, assigned to it by treaty, as a guarantor of Cyprus' independence. Only in 1983, after the passage of 9 years following the invasion and 20 years after the Greek Cypriot majority terminated the Turks' constitutional protections, did the then-recently formed TRNC proclaim its independence, and yet it continued to negotiate its possible reunification with the rump Republic of Cyprus periodically but intensively for decades thereafter. Northern Cyprus can hardly be described as a state created through secession. It was entirely a much-delayed—and, even then, ambivalent and, except for Turkey, unrecognized—product of the Turkish invasion. Since neither Singapore nor northern Cyprus had seceded from the larger state of which it had been a part, the Bangladeshi case stood alone for nearly a half-century.[35]

Even the best definitions, of course, need to leave room for marginal cases, and we shall need to evaluate some such cases. The most important of these concern certain republics of the Soviet Union. But first we need to attempt a definition of federalism.

The major theorists of federalism have not produced a single, widely adopted definition of federalism. William Riker describes a federal state as one in which "(1) two levels of government rule the same land and people, (2) each level has at least one area in which it is autonomous, and (3) there is some guarantee … of the autonomy of each government in its own sphere."[36] The many influential federal theorists may not agree on exactly what federalism is, but they know what it is not. It is not a form of autocracy, a point Riker implies when describing it as "the main alternative to empire as a technique of aggregating large areas under one government."[37] Other theorists describe federalism as providing "meaningful autonomy for the state's constituent territories," as requiring officials to be directly elected by the people they serve, and as being identified with liberal democracy.[38] On each of these counts, the Soviet Union fails to qualify as a federation but readily qualifies as a successor to the Russian Empire.

[35] For the sake of completeness, perhaps it is worth pointing out that Taiwan, under Japanese occupation from 1895 to 1945, has not seceded from China.

[36] William Riker, *Federalism: Origin, Operation, Significance* (Boston: Little, Brown, 1964), p. 11.

[37] Ibid., p. 5.

[38] These are the formulations of, respectively, Stephen Tierney, Mikhail Filippov and coauthors Peter Ordeshook and Olga Shvetsova, and Preston King.

The Soviet Union was not a genuine federation, for its union republics had few genuine powers.[39] Very often ethnic-minority union republics had been controlled by Russian second secretaries or even Russian first secretaries of the republics' Communist Party, rather than by local (non-Russian) first secretaries.[40]

The Leninist doctrine of democratic centralism legitimized that control. The "obsession with centralized control"[41] was a feature of Soviet politics going back to the immediate post-revolutionary period, during which communist parties in the non-Russian republics were, essentially, regional committees of the Russian party.[42] Early on, Joseph Stalin was in charge of the Commissariat of National Affairs, in which capacity he enunciated the doctrine that governed nationality policy: "national in form, socialist in content," a doctrine applied long after the death of Stalin.[43] Some administrative tasks were assigned to the republics, but serious policy devolution was not standard practice.[44]

The formal consolidation of the Soviet territories into a single state began in 1922, at a time when Lenin, who feared the adverse effects of "Great Russian chauvinism" and advocated greater solicitude for national minorities, was too ill to oppose the unrelenting centralization of Stalin and his followers. A year earlier, the national movement of the Georgians in the Caucasus had been suppressed by force. All this was to the dismay of Lenin, who stigmatized the centralization impulse as being "borrowed from Tsarism."[45] Lenin was no democrat, of course, but he had envisioned a different organization of the Soviet Union from the one created by Stalin that had rightly earned the label of empire in 1921 and seven decades later.

If we are testing arguments about federalism and secession, there are three straightforward questions that frame the inquiry:

[39] See Rasma Karklins, *Ethnopolitics and the Transition to Democracy: The Collapse of the USSR and Latvia* (Baltimore: Johns Hopkins University Press, 1994), pp. 27–28. See also Edward W. Walker, "The Long Road from Empire: Legacies of Nation Building in the Soviet Successor States," in Joseph W. Esherick, Hasan Kayali, and Eric Van Young, eds., *Empire to Nation: Historical Perspectives in the Making of the Modern World* (Lanham: Rowman & Littlefield, 2006), pp. 299–331, at p. 315, on the "entirely fictional" sovereignty of the union republics.

[40] See John H. Miller, "Cadres Policy in Nationality Areas: Recruitment of Second Secretaries in Non-Russian Republics of the USSR," *Soviet Studies*, Vol. 29, no. 1 (1977), pp. 3–36.

[41] Leonard Schapiro, *The Communist Party of the Soviet Union*, rev. ed. (New York: Vintage Books, 1971), p. 225.

[42] Ibid., p. 227.

[43] See, e.g., Walker Connor, *The National Question in Marxist-Leninist Theory and Practice* (Princeton: Princeton University Press, 1984), pp. 201–22.

[44] In the Khrushchev period, a modest devolution to regional economic councils (*sovnarkhozy*), mainly at the *oblast* or region level (but some at the republic level), was plagued by a degree of "localism" that the leadership found unacceptable. The councils were abolished in 1965.

[45] For this period, see Pipes, *The Formation of the Soviet Union*, pp. 235–74. The quotation is from a document Lenin had produced. Ibid., p. 273.

Was the Soviet Union a federation?
Were there secessions at the time of or after its dissolution?
If so, were powers conferred on the constituent units a cause of secession?

The evidence strongly suggests that the answers for the USSR are, respectively, no, yes, and no. The Soviet Union, I shall show, was not a federation, and it is a mistake to conflate the USSR with a federation, in spite of its putatively federal structure. There were secessions when the Soviet Union dissolved, but I shall explain that these were not a result of any powers conferred on the union republics that seceded. They were the consequence of grievances that long antedated their departure.

The same three questions, I shall suggest later, are applicable to Yugoslavia and Czechoslovakia, but with different answers. By the time they dissolved, both had significant attributes of federal states. In the Yugoslav case, there were also secessions, but not as a result of any federal powers that had been conferred. In that case and the Czechoslovak case, the explanations for secession do not mirror those applicable to the Soviet Union. Each of these three countries must be examined separately.

I am sure this all sounds mysterious and perhaps hard to accept, so let me proceed to chart their different paths.

The Soviet Union: Who Seceded and Who Did Not

The event that set in motion the emergence of many newly independent states after 1989 was the dissolution of the Soviet Union, which resulted in the independence of its 15 constituent union republics. These events were reminiscent of the dissolution of the other great empires: the Spanish Empire in the nineteenth century, the Austro-Hungarian and Ottoman Empires after World War I, and the French, British, Dutch, Belgian, Portuguese, and Italian Empires in the decades after World War II. We do not describe the process by which new states emerged from those empires as secessions. Similarly, with exceptions to be enumerated, the independence of all 15 constituent Soviet republics upon the dissolution of the larger unit can hardly be described indiscriminately as secessions, any more than the instances of independence of former British or French colonies in the 1950s and 1960s were secessions comparable to those of Bangladesh or (four decades later) South Sudan, which were movements responding to ethnic conflict and grievances in the domestic politics of their respective countries. In the Soviet case, that dissolution was really the delayed disintegration of the Russian Empire,

which the Soviet Union had reestablished after the Bolshevik Revolution,[46] augmented by a few new states, particularly Latvia, Lithuania, Estonia, and Moldova, which had been absorbed by the USSR during the early phases of World War II.

Why is it problematic to refer indiscriminately to the states that became independent after the dissolution of the great empires as secessionist? The end of empire, by itself, with its frequent genesis in the capital of the metropole or a loss in international warfare and a resulting involuntary, wholesale disgorging of colonies, is very different from the deliberate departure of a group or groups with their territory from what had previously been recognized as a single overarching state or, for that matter, even from an established empire. We shall need to recognize this distinction in the Soviet case.

If we are to count, let us say, Tajikistan and Armenia as post-1991 secessionists, then we might also have to count India and Nigeria as secessionists from the British Empire, Benin and Mali as secessionists from the French, and so on for the former Dutch, Belgian, and Italian territories. We could do this, of course, terminology's being the conventional device that it is, and bearing in mind that there were, in the case of empires, movements for independence in quite a few colonies. If we did, however, we would still need to make the conceptual distinction between those "secessions" and the ones that emanated from non-imperial states, not more or less simultaneously but from rather different causes and from the discontent and action of the particular secessionists rather than the interaction of a dying center and all of its parts. The distinction is between a collapse of the center that frees the component states, whether or not they had actively sought freedom, on the one hand, and the departure of an independence-minded portion of the overarching state, with or without the agreement of the center, on the other. The distinction will not always be perfectly sharp, because the collapse of the center can take place over time, but it is certainly possible in the Soviet case to recognize whether we are observing one phenomenon or the other.

The distinction is especially pertinent if we are considering the frequency or rarity of secessions, and especially the frequency of secessions from federal states—and, especially, secessions as the ineluctable result of federalism or regional autonomy and the institutions associated with it. For empires very often take a federal form, embracing numerous constituent units, and

[46] For the way in which the Soviets re-conquered the territories of the Russian Empire, see Richard Pipes, *The Formation of the Soviet Union: Communism and Nationalism, 1917–1923* (Cambridge: Harvard University Press, 1957).

so can skew a tabulation of that frequency, unless we take note of the difference between the active pursuit of secession and the mere increase in the number of independent states as a result of disappearing empires. If we are interested in federation as causation, we need to assess the end result and the action that preceded it against the mechanisms asserted to be inherent in the federal form—and to confine ourselves to genuine federations, without including empires that merely assume a federal form.

How, then, should we count the creation of new states from the former Soviet Union? Fortunately, there are some modestly bright lines. Here is how Edward W. Walker deals with this precise question at the very beginning of his fine book, entitled *Dissolution*. There was, he says, "a counterintuitive aspect" to the dissolution:[47]

> Contrary to popular assumptions, it had nothing to do with the distribution of nationalist or separatist aspirations. In certain cases, such as Estonia, Latvia, Lithuania, and Georgia, nationalist and separatist sentiments at both elite and popular levels were indeed widespread and deeply felt by the end of the Gorbachev era. In others, however, these sentiments were shared by a decided minority, as evidenced most clearly in the Gorbachev-sponsored referendum of 17 March 1991 on the preservation of the union, which was held a mere nine months before the USSR passed into history.
>
> Although six union republics—Azerbaijan, Estonia, Latvia, Moldavia (Moldova), Lithuania, and Georgia—announced an official boycott, overall turn-out elsewhere was high, and of those voting, 76.4 percent expressed their support for the union, with large majorities voting "yes" in Belorussia (Belarus), the five Central Asian republics, Russia, and Ukraine. Moreover, in the Central Asian republics, political elites were overwhelmingly in favor of preserving the union.[48]

Making exactly the distinction that I wish to make between secessionists and inadvertent beneficiaries of the dissolution, Walker continues: "In this sense, rather than 'winning' their independence, it would perhaps be closer to the truth to say that Kazakhstan, Kyrgyzstan, Turkmenistan, Uzbekistan, Tajikistan, and Belarus, and arguably even Russia and Ukraine, had independence forced upon them."[49]

On this account, at most 6 of the 15 union republics could be considered to favor secession. Other indicators of determination to secede, such as refusal

[47] Edward W. Walker, *Dissolution: Sovereignty and the Breakup of the Soviet Union* (Lanham: Rowman & Littlefield, 2003), p. 2 (footnote omitted).

[48] Ibid.

[49] Ibid. Ukraine had gone back and forth, but Walker's judgment is that, in the end, it did not secede. For the omission of Armenia, see note 50.

to sign the Union Treaty favored by Gorbachev, failure to participate in future activities of the Union, and failure to participate even in the much weaker Commonwealth of Independent States, make clear that the five named above, now without Azerbaijan,[50] were in the secessionist category, leaving a total of five: Estonia, Latvia, Lithuania, Georgia, and Moldova.[51]

That is not to say that there was no secessionist sentiment in any of the 10 non-secessionist states. Roeder makes the point that whereas Communist Party leaderships in the Baltic states encouraged politicized ethnicity, leaders in Ukraine and Belorussia (Belarus) discouraged or blocked it.[52] Undoubtedly, too, the early vacillation of Armenia and Azerbaijan did not reflect a lack of ethno-nationalist sentiment, but both ended up in the non-secessionist camp, perhaps because both hoped for Russian help on the disputed territory of Nagorno-Karabagh. Ethnic sentiment may be a precondition for secession, but instrumental considerations can defeat its expression in action.[53]

Notice that neither separate political parties nor separate "republican bases" can account for the different results of republics in the USSR. The secessionist republics and the non-secessionist ones both had the same republican bases and the same separate ethno-political parties—or, to put it more accurately, similar branches of the singular, highly centralized Communist Party of the Soviet Union.

If we are concerned about the extent to which devolved authority is conducive to secessionism, and especially conducive to successful movements to leave the overarching state, it is best to keep the mere creation of new states when empires dissolve apart from secessions that result from independence movements that are activated or reach fruition during such dissolutions. Two thirds of the union republics in the USSR and three quarters of the non-boycotting publics evinced little or no desire to secede. They merely accepted independence when it was conferred on them.

The secessionist republics had something in common that they shared with several successful secessionists outside the communist world. The Baltic states had been ready to leave the Soviet Union from the time of their forcible incorporation in 1940 and reoccupation in 1944. When given the chance, they did secede.[54] Mikhail Gorbachev's decision not to use lethal force to

[50] Like Azerbaijan, Armenia wavered a bit on independence but had not boycotted the 1991 referendum and before long came down against independence.

[51] See Walker, *Dissolution*, pp. 109, 129, 140, 143, 158–60. By contrast, the "sovereignty declarations" issued by all union republics except Armenia were not tantamount to declarations of independence. See ibid., pp. 63–65.

[52] Roeder, "Soviet Federalism and Ethnic Mobilization," pp. 210–11.

[53] Compare ibid., pp. 229–32.

[54] For the development of their movements at the time of Glasnost to restore the status quo ante 1940, see Walker, *Dissolution*, pp. 56–59.

prevent their departure abetted their ability to leave;[55] but, once the use of force had been more or less renounced, the Baltic states would have departed whether the Soviet Union was a federation or not. In each case, they sought to return to a restored national state, rejecting the notion that they were a Soviet successor republic. With a smaller Russian population in its territory, Lithuania was most eager to leave. Latvia and Estonia were somewhat more cautious but not far behind. Moldova, also the product of a Soviet wartime acquisition in 1940, based on the Nazi-Soviet Pact of 1939 that transferred territory that had been part of Romania since 1918, was in the same category.

Georgia, too, had a claim of illegitimate incorporation, going back to 1921, when, after three years of independence, it was forcibly brought into the Soviet Union, erasing its previous national status. Georgian nationalism may have been muted during much of the Soviet period, but it was not dead. In 1956, demonstrations broke out in Tbilisi following Khrushchev's speech denouncing Stalin. The army fired on the demonstrators. In the aftermath, Georgian nationalism took on a secessionist cast. When the Soviet government attempted in 1978 to remove Georgian as the sole official language of that heterogeneous republic, there were renewed demonstrations that only abated when Moscow was induced to withdraw the policy change. From that point on, Georgia was consistently with the union republics aiming at secession, a sentiment that only grew after Soviet troops had attacked and killed 20 peaceful nationalist protesters in Tbilisi in 1989.[56]

Lithuania endured a 17-month-long economic embargo and bouts of Soviet military intimidation as it tested its ability to leave. The other four in this category also made clear their determination to depart. In contrast to the remaining republics, these five were secessionist.

Ukraine voted for independence by an overwhelming majority in December 1991, but by then it was very clear that the Soviet Union was dissolving. Within a week, it was officially declared that the Soviet Union no longer existed. Ukrainians had many grievances against the Soviet authorities, going

[55] At various points in the separation process, however, Soviet troops were sent to occupy certain installations.

[56] Disputes over South Ossetia and Abkhazia, regions of Georgia whose autonomy was revoked by the Georgian government, also played a role. Russia was assumed to be manipulating these disputes, but it was also true that Georgia had had an early, well-developed sense of nationhood and a short period of independence after the Bolshevik Revolution. For several points concerning Georgia, I am indebted to two email communications from Edward W. Walker, January 28, 2023, and April 21, 2024. The subsequent Abkhaz and South Ossetian secessions from Georgia, or perhaps they are more accurately identified as Russian irredentist territories, are discussed further in the next chapter.

all the way back to the famine of the 1930s, and large numbers of Ukrainians had made clear in demonstrations as early as January 1990 that they favored independence. Their exit might count as a secession, but the republic's leadership and the bulk of the population had other ideas, and in the earlier referendum on a new Union Treaty the Ukrainians voted yes by more than 70 percent in favor of preserving the Union, with 83 percent turnout—and, importantly so, in the face of a boycott called by secessionist republics.[57] Ukraine might be considered a borderline case, but it is not in the same category as the five determined secessionists, and Ukrainians had strong affinities with Russia.[58]

There was nothing foreordained about these events.[59] The decision of Boris Yeltsin, entangled in a rivalry with Gorbachev, to dissolve the Soviet Union was the immediate precipitant of the dissolution of the post-Tsarist version of the Empire.[60] The tactic Yeltsin used was facilitated by the office of president he held in the Russian Republic, which was an artifact of the pseudo-federal structure of the Union—about which more shortly—but the causal relation of federalism to secession is not settled by this event. Once the legitimacy of the communist state had been undermined, the dissolution of the Empire, structured as a federation or not, would probably have occurred anyway, especially after the Balts had departed.[61]

The point is that the structures of federalism did not produce or even abet secessions from the Soviet Union.[62] Rather, the breakup of the putatively federal state provided the opportunity for secessionists to make their exit. The only effect that purportedly federal structures had was to facilitate the departure of those who wished to secede along the boundary lines of those

[57] Walker, *Dissolution*, p. 118. The three Baltic states, plus Moldova, Georgia, and Armenia, were the boycotting republics, but Armenia got back in line afterward.

[58] Evidenced by growing rates of intermarriage between Ukrainians and Russians. Philip Goldman, Gail W. Lapidus, and Victor Zaslavsky, "Introduction," in Lapidus, Zaslavsky, and Goldman, eds., *From Union to Commonwealth: Nationalism and Separatism in the Soviet Republics* (Cambridge: Cambridge University Press, 1992), pp. 1–21, at p. 8. The same authors identify the same five secessionist republics as Walker does.

[59] See, e.g., the several proposals circulating for a new federation or confederation. Michael Rywkin, "Federation, Confederation, or Disintegration," *Nationalities Papers*, Vol. 21, no. 2 (1993), pp. 163–65.

[60] See Victor Zaslavsky, "The Evolution of Separatism in Soviet Society under Gorbachev," in Lapidus, Zaslavsky, and Goldman, eds., *From Union to Commonwealth*, pp. 71–97. Yeltsin's decision does not make Russia a secessionist state; it was, thereafter, very much the rump state, the center around which the remaining republics gathered.

[61] And had the Balts, Moldovans, and Georgians not been so eager to leave, perhaps the Union would have survived. As I show in the next chapter, their earlier experience created what I call a serious risk factor for secession.

[62] Mikhail Filippov, Peter C. Ordeshook, and Olga Shvetsova, *Designing Federalism: A Theory of Self-Sustainable Federal Institutions* (Cambridge: Cambridge University Press, 2004), pp. 76–110, make the case that open-ended bargaining about an array of federal design issues, with no binding prior understandings about expected reciprocal behavior, was conducive to dissolution of both the Soviet and Czechoslovak federations.

republics established by the imperial power.[63] The remaining union republics also received their independence with similarly established boundary lines.

The Yugoslav Difference

Although the unification of the South Slavs was a longstanding desire among some intellectuals from the region, ethno-religious differences were prominent in the territory that was awkwardly patched together as Yugoslavia after World War I. That structure was pulled apart by the Axis powers, together with their allies Bulgaria and Romania, during World War II. That war had also given rise to genocidal action, especially between the Croat Ustaše and the Serb Chetnik paramilitaries, which also prompted creation of Bosnian Muslim (Bosniak) paramilitaries for self-protection after they were also victimized.

Following the Soviet example, when the Yugoslav state was reconstructed after the war, each of the six republics had a constitutional structure that made it, despite the serious heterogeneity of several republics, the homeland of a titular nationality. As in the Soviet case, when the breakup came, this arrangement encouraged dissolution along the boundaries of the constituent republics.[64] Likewise, republics with discontented minorities within them experienced internal conflict, just as Moldova and Georgia did with their minorities.

It is worthwhile contrasting events in Yugoslavia with those in the USSR. To be sure, Yugoslavia was not an empire in the way the Soviet Union and its Russian predecessor were. In neither Yugoslavia nor Czechoslovakia was the dissolution of the federation a foregone conclusion. Whereas the Soviet secessions related to long-nurtured, preexisting grievances, all the departures from Yugoslavia were secessions that took shape as a result of specific events that accompanied and precipitated the dissolution. Moreover, disputes over reforming the Yugoslav federation had been ongoing for years. Yugoslavia's federal devolution had been far more complete than anything attempted in the Soviet Union; it went back to the 1960s and 1970s and

[63] As Walker makes clear. See his three facilitating conditions. *Dissolution*, p. 5. With very few exceptions, most notably Nagorno-Karabagh, Transnistria, Abkhazia, and South Ossetia, those boundaries proved durable.

[64] See Robert M. Hayden, "Constitutional Nationalism in the Former Yugoslav Republics," *Slavic Review*, Vol. 51, no. 4 (1992), pp. 654–73; Hayden, "Constitutional Nationalism and the Wars in Yugoslavia," paper presented at the conference on Post-Communism and Ethnic Mobilization, Cornell University, April 21–23, 1995.

entailed the decentralization of the party, the state, and the economy. By the 1990s, Yugoslavia resembled "an international system composed of six, relatively autonomous dictatorial entities of varying political and economic, not to mention [ethno-national] persuasions."[65] By then, it was, in short, a federation.

Due to their poor performance, the state and the Communist Party had lost the legitimacy that the wartime partisan forces, led by Josip Broz Tito, had managed to confer on them following the victory over Nazism.[66] With more decentralization than other communist states, Yugoslavia had even enjoyed (if that is the word) decentralized militia units. The Yugoslav republics were led by quite independent actors, who had conflicts with the center and with each other. The disintegration of the regime would be slow, complete, and filled with warfare, but it was not inevitable.

Whereas Russians and Czechs, the largest ethnic groups in the other two federations, were identified with the regime, Serbs, the largest Yugoslav group, were not, at least at first. They were underrepresented in many state institutions but overrepresented in the army officer corps. As the crisis grew in the late 1980s and early 1990s, Serb leadership wanted to recentralize the regime or, if that were impossible, to create a greater Serbia, including Serb-inhabited areas of republics outside of Serbia.[67] Serbian nationalism was embittered; it represented the Serbs as a deprived people with a history of "victimization," in search of its just deserts and its full national and cultural integrity.[68] The Yugoslav National Army (JNA) was inward looking, unlike the Soviet and Czechoslovak armed forces, which focused on external matters. The JNA was the guardian of socialism and the state, and that accounts for much of the ensuing violence.[69]

Slovenia was furthest along in encouraging political pluralism and challenging federal authority. Serbia, by contrast, supported federal authority but had also placed a strong Serb-nationalist cast on the governance of its republic, a cast that impeded the survival of the federation. Croats had been more cautious at first, but after Serbian politicians had made appeals to the somewhat downtrodden Serbs of Croatia, the Croatian government downgraded the status of its Serbs from an equal "constituent people" to that of a "national minority" and began actively to discriminate against them,

[65] Bunce, *Subversive Institutions*, p. 73. With competitive elections, those entities came to be led by ethno-national leaders. Ibid., p. 121.
[66] Ibid., pp. 51–52.
[67] Ibid., p. 95.
[68] Ibid., p. 92.
[69] Ibid., pp. 113–22.

prompting Croatian Serbs to demand an autonomous region.[70] The Croatian government also began to join Slovenia in demanding greater decentralization. This was the background against which secessionist sentiment grew, but as a response to Serb assertiveness. By 1989, there had been several years of inter-republican contestation along these lines.

Inter-republic conflict became entangled with fears of Serb domination. These were fostered by the actions of the Serb leader, Slobodan Milošević, in a post-communist Yugoslavia that had had some encouragement of Serb hegemony from elements in Moscow. Most non-Serb groups took steps to pursue their interests accordingly.[71]

The dissolution of Yugoslavia may have marked the death of an externally created regime that many people, inside and outside the country, thought artificial and vulnerable to fragmentation, but it had little to do with the supposed ethno-nationalist sentiments and projects supposedly stirred up by the powers confided to the various republics in ethnically based federal regimes. On the contrary, the Serb leadership was not interested in secession but in hegemony in the whole country. It is possible, perhaps likely, that the Yugoslav federation could have been saved by serious conciliatory action at the center and further decentralization, rather than the provocative action taken by Milošević. He had won the Serbian party presidency in 1987 and managed to place his own people in positions of authority, purged the liberal wing of his party, then became president of the Serbian republic in 1989 and the following year revoked the autonomy of Vojvodina and Kosovo, paying special attention to victimizing the Albanian majority resident in the latter region. From then on, Milošević's actions against Kosovo's Albanians and theirs against Serbs were unrelenting.[72] As extreme Serbian nationalism began to take effect, other ethnic groups began to see Serbs who were minorities in their republics as being of questionable loyalty.[73]

The end of Yugoslavia was clearly precipitated by secessionist movements in reaction to the Serb leader's moves. Federalism obviously played a role in these secessions, but not the one hypothesized by proponents of the view that federalism creates parties, powers, cultural movements, and "ethno-nationalist projects" that conduce to secession of the component separatist federal units. Rather, its role was to empower an aspiring central

[70] Susan Woodward, *Balkan Tragedy: Chaos and Dissolution after the Cold War* (Washington, DC: Brookings Institution, 1995), pp. 102–08.

[71] I shall say more about this in the next chapter, when we consider changing power balances as a risk factor for secession.

[72] See Roger Petersen, *Understanding Ethnic Violence: Fear, Hatred, and Resentment* (Cambridge: Cambridge University Press, 2002), pp. 208–53.

[73] Woodward, *Balkan Tragedy*, pp. 89–94.

hegemonist who used his republican powers, including control over formerly autonomous units within Serbia and over Montenegro as well, to seize central government powers and to diminish the autonomy of the other federal units, to the point that, in their own defense, they embarked on secession. The entire logic of the federalism-breeds-separatism argument was defied by events in Yugoslavia. It was the changing balance of power in the capital and the push for central control against powers of the republics that precipitated secessionism on their part.

Predictably, the initiative toward disengagement was seized by Slovenia, the second smallest republic by population, as disputes over economic reform and budgetary contributions arose, on one hand, and over ethno-cultural politics, on the other, in the late 1980s. Slovenia was the first republic to deny federal authority, and if all the republics had wished, as it had, to create an even weaker federation, that might have been possible. Serbia, however, supported the federal government and, because the Serb population, about 36 percent of the total, was divided among four separate republics—Serbia, Croatia, Montenegro, and Bosnia-Herzegovina—further decentralization of authority might well inure to the disadvantage of Serb minorities in the latter three. There were small Serb minorities in Macedonia and Slovenia as well.

Simultaneously, the Slovenes were engaged in challenging the exercise of federal powers by the Serb leadership, including even the army's practice of stationing troops anywhere in the country. Slovenia favored locally homogeneous army units as a matter of self-defense. In 1988, the Slovenes refused to participate in a referendum on a new federal constitution. Croat attacks on the Croatian Serb minority had also produced a Serb demand for autonomy in the Krajina region of Croatia. The conflicts were no longer merely between republics but between the Serb-dominated central government and two constituent republics.[74]

By the end of 1989, more than a year after Milošević had ascended to control of the federal government, the Slovene parliament asserted a right to secede. Slovenia withdrew its police unit from the federal forces; Croatia followed suit. These disputes and the minority problems to which they gave rise had reverberations in other republics. Abuse of Serbs in Croatia convinced them and their newly created militias of the need for protection from Croats. The downgrade of Kosovo's autonomous status had reverberations in adjacent Macedonia, with its strong Albanian minority. Political parties spanned republic lines, so that what Croatia's ruling party did in Croatia affected its

[74] For the Slovene and Croat march (or methodically slow walk) to independence, see Woodward, *Balkan Tragedy*, pp. 110–44.

position in Bosnia, and Milošević's party was the party of Serbs in Croatia and Bosnia as well. There was no quarantine of these constitutional and ethnic disputes.

Slowly, the dissident republics wrested powers from the central government, including, crucially, command over republican army units. That paved the way for the wars to follow. In 1990, Slovenia and Croatia purchased arms from stocks in Czechoslovakia and Hungary, which had been reducing them. Referenda on sovereignty and then on independence followed, which were often boycotted by minorities in each republic. What had begun as a dispute over the nature of the constitution ended with the brutally violent dismemberment of the country.[75]

Once Slovenia and Croatia had seceded over the violent objection of Serbia, the chances of avoiding warfare in Bosnia, with its large populations of Serbs, Croats, and Bosniaks, the last-named with a plurality in the republic of about 44 percent in 1992, were limited.[76] There were several proposals for a new federation or confederation, some including Slovenia and Croatia, but no agreement. Bosnia held an independence referendum in February 1992, which was boycotted by Serbs, as they had also opposed an earlier sovereignty resolution.[77] Bosnian Serbs and the Yugoslav army, by then heavily Serb in composition, were organizing to oppose it. A long and very brutal war followed, with Bosniaks having procured arms from Pakistan, Iran, Turkey, and other Muslim countries. Bosnian Croats, of course, had support from Croatia. The fighting was ended with the Dayton Accords of 1995 that produced an awkward new Bosnian federation between the Republika Srpska on one side and what was called the Federation (for Bosniaks and Croats) on the other.

An accurate count of secessions thus needs to include Slovenia, Croatia, and Bosnia-Herzegovina, and what became North Macedonia. Serbia, on the other hand, fought to preserve the federation and to aid Serbs fighting in Croatia and Bosnia, and it became the rump state, at first joined with Montenegro. The subsequent secessions of Montenegro, based on a narrow referendum result, and of Kosovo also need to be included on the list.

[75] The warfare was confined to Serbia, Slovenia (but only briefly), Croatia, and Bosnia. Macedonia secured its independence peacefully through a referendum in 1991. Montenegro, which initially opted to stay in a federal relation with Serbia, chose independence, also by referendum, in 2006.

[76] Books on the Bosnian war are numerous. Among the best, see Steven L. Burg and Paul S. Shoup, *War in Bosnia-Herzegovina: Ethnic Conflict and International Intervention*, 2nd ed. (Armonk: M. E. Sharp, 1999).

[77] By then, Slovenia and Croatia's independence had received considerable international recognition, and Bosnia's followed within months of its referendum.

The international legal legitimacy of the departure of the Yugoslav republics, when it was already underway, was put to a European Arbitration Committee attached to an International Conference on the Former Yugoslavia in 1991. The committee, chaired by Robert Badinter of the French Conseil Constitutionnel, pronounced Yugoslavia to be a federation "in the process of dissolution,"[78] and it therefore concluded that independent states could emerge within the previous republican boundaries but not within any others.[79] Absent agreement of the republics, how could the federation be in the process of dissolution without a prior attempt at secession, whose very legitimacy was then to be judged by the process of dissolution it had initiated? This was a conundrum the committee did not attempt to answer. But there was no doubt, as Badinter said, that Yugoslavia was a dissolving federation, and in the first instance the dissolution took place along the lines of the various republics, despite ethnic heterogeneity within some of them.

The Badinter Committee declaration that Yugoslav republics could depart the federation, but only intact, meant that there was to be no recursive secession—that is, no further secession of territory (such as autonomous regions) from secessionist units at the republic level. Additional secessions from within those republics—of Hungarians or Albanians from Serbia, Serbs from Croatia, Croats or Serbs from Bosnia, or Albanians from Macedonia—were not to be legitimized merely because the federation was in the process of dissolution.[80] For some years, there was no recursive secession accomplished, until violence in the Kosovo autonomous region of Serbia made its resolution exigent. The means for that resolution was the NATO bombing of Serbia in 1999, followed by a United Nations Interim Administration that paved the way for an independent Kosovo.

Federalism and the Two Dissolutions

Both the Soviet Union and Yugoslavia might have had secessions even if they had been unitary states. In the Soviet case, dissolution preceded secessions of five republics, each with a preexisting nationality and an experience of having been illegitimately incorporated and a preexisting desire to leave. In Yugoslavia, dissolution was not a foregone conclusion. Rather, dissolution

[78] Opinions of the Arbitration Committee, reported by Alain Pellet, "The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples," *European Journal of International Law*, Vol. 3, no. 1 (1992), pp. 178–85, at p. 183.

[79] Unless the republics were to agree otherwise, which, of course, they did not. Ibid., pp. 183–84.

[80] For further discussion of the Badinter decision, see Horowitz, "Self-Determination: Politics, Philosophy, and Law," pp. 421–63, at pp. 435–36.

and secession were coincident. In Yugoslavia, it was, as indicated, federal dysfunction, the growing ambition of Slovenia for autonomy, and the aggressive attempt of the Serb leadership to change the balance of power that were the proximate causes of secession attempts. The fear of domination by a relatively large and antagonistic group at the center of power is a typical precipitant of secession, as it was in Nigeria, Bangladesh, and South Sudan, and it is not surprising that all the constituent Yugoslav republics except Serbia eventually seceded.

Boundaries, Mutable or Immutable

In Yugoslavia, federalism initially produced the attempted secession of intact federal units, effectively in the case of homogeneous Slovenia, but it was not always adequate to hold ethnically heterogeneous units together. Heterogeneity fed the Yugoslav wars. Croatia and North Macedonia ultimately had to put in place special arrangements for ethnically differentiated groups. As mentioned, Bosnia was barely preserved, but only by quite decentralized and still precarious federal arrangements and a limited central government, all supervised by a powerful European High Representative with the aid of an active Organization for Security and Co-operation in Europe (OSCE). The arrangement was pieced together in the Dayton Accords of 1995.

Remarkably, most of the heterogeneous republics of the former Soviet Union managed to maintain their territorial boundaries after the dissolution. There were exceptions, especially after Vladimir Putin became president and especially among the two non-Baltic secessionists, Georgia and Moldova. Georgia experienced secessionist uprisings, supported by Russian troops, in Abkhazia and South Ossetia. Russian involvement had an irredentist flavor to it, as Russians were retrieving territories from an ex-republic government that wanted no part of the former Soviet Union or its Russian successor state. Similarly, irredentism characterized the Russian seizure of Transnistria, a slice of Moldovan territory inhabited mainly by Russian speakers and adjoining Ukraine. Among the non-secessionist republics that became independent, Azerbaijan encountered a movement among Armenians in Nagorno-Karabagh, supported by Armenia and Russia. Ultimately, the territory was returned by force to Azerbaijan, producing the flight of the Armenian population to Armenia. Both Uzbekistan and Tajikistan fell into internal warfare once the Soviet Union was no more.

Considerable boundary stability, however, persisted in Russia itself. Within Russia, Chechnya seriously sought secession as a result of very harsh

discrimination by the center.[81] Chechnya, however, was unique. Tatarstan's vigorous quest for autonomy was settled, at least for some years, by a generous measure of devolution accorded by the Yeltsin regime. There was no serious support for secession as those negotiations proceeded.[82]

At the time of the dissolution of the USSR, the Russian republic contained numerous ethnic groups, many of which saw themselves as "titular peoples" and "rightful 'owners'" of the 31 autonomous regions that covered almost 50 percent of its territory.[83] In spite of the fact that many of these regions were ethnically heterogeneous, and non-titular groups were commonly regarded as second-class citizens, the boundaries of the regions have proved to be remarkably stable. With few exceptions,[84] secession had relatively little appeal inside Russia. As Walker has said, "For the most part, it was the regime, not the state, that was at issue."[85]

Based on what we have seen of the Soviet case, it is hard to make the argument that federalism provided resources that were conducive to secession. For groups interested in seceding, federal boundaries were used, even though some of those boundaries had been slightly altered at the time of the initial incorporation of those territories in the USSR. Had there been no such federal boundaries, there is nothing to indicate that those groups would have refrained from seceding once the center had become as weak as it had. In the case of Yugoslavia, there is no real doubt that federalism was not the cause of secessionist movements. Serb assertiveness and capture of the center were. Federalism did for Yugoslav republics what it did for the Soviet republics: it provided ready-made containers in whose boundaries new states emerged. Within several of them in both countries, there were further conflicts and, in one case (Kosovo), another secession.

The Czechoslovak Secession, or Was It Partition?

The death of Czechoslovakia, the other dissolution that took place in the shadow of the death of the Soviet Union, has generally been considered the

[81] See Valery Tishkov, *Chechnya: Life in a War-Torn Society* (Berkeley: University of California Press, 2004), pp. 52–53; Moshe Gammer, "Nationalism and History: Rewriting the Chechen National Past," in Bruno Coppieters and Michel Huysseune, eds., *Secession, History, and the Social Sciences* (Brussels: Brussels University Press, 2002), pp. 117–40.

[82] Tatarstan voted 87.5 percent in favor of preserving the USSR in the 1991 referendum. Tatarstan's president was decisively opposed to independence.

[83] Walker, "The Long Road from Empire," p. 299.

[84] Tuvans and Buryats did moot the possibility of secession. After anti-Russian violence in Tuva in 1990, many Russians departed from that autonomous republic.

[85] Walker, "The Long Road from Empire," p. 301.

result of secession on the part of Slovakia, but a different interpretation is possible. The events in the USSR caused a rethinking of the federal arrangements in Czechoslovakia. Following the peaceful overthrow of the Czechoslovak communist regime in late 1989, negotiations were begun on new constitutional arrangements. The Czech side favored a relatively centralized federation, whereas the Slovaks preferred a less centralized one.

There had been no presumptions about the character of the outcome, despite a prior unconstitutional Declaration of Independence by the Slovak National Council, which did not preclude subsequent negotiations or foreordain their outcome. Slovakia certainly had a longstanding claim for more self-government, and the Slovaks already had *de facto* vetoes enshrined in the constitution,[86] which were frequently utilized, making agreement on everything more difficult.[87] Whatever their differences during the negotiations, the two sides were still talking about maintaining the federation. Despite its smaller population than the Czech side and its weaker economy, Slovakia did not have an insecure negotiating position. Moreover, as late as the second half of 1991, public opinion in both populations favored living together in a single state.[88] Institutions and elite ambitions, however, produced a different outcome.

The Czechoslovak state did not have a single-party system, and the system on the Slovak side was fluid, because the electoral system was conducive to the proliferation of parties. In the absence of a party system that spanned the boundary between the two republics, there was neither identification with the overarching state nor any concern about the need for votes outside each republic. The thrust of Slovak politics was centrifugal.[89] Several new parties appeared, and Slovak politicians began to promote more extreme demands. The 1992 Slovak elections produced increasing support for separatist parties.[90] As the constitutional discussions unfolded, no proposal was simultaneously agreeable to both sides, adding a frustrating element of time inconsistency to the negotiations. At the same time, the position of Slovak

[86] Czechoslovak Federation, Constitutional Act no. 143 of 1968, arts. 41, 42. On some matters, article 41 required a vote of three fifths of the lower house and three fifths of each half (the Czech half and the Slovak half) of the Chamber of the Nations. On others, article 42 required a majority of each half of the Chamber of the Nations. These were high hurdles.

[87] Katarina Mathernova, "Czecho? Slovakia: Constitutional Disappointments," *American University International Law Review*, Vol. 7, no. 3 (1992), pp. 471–501, at pp. 482–83.

[88] See ibid., p. 485 n.50.

[89] Simon Toubeau, "Partisan Attitudes and Constitutional Settlements in Democratizing Divided Societies: Spain and Czechoslovakia," in Jacques Bertrand and Oded Haklai, eds., *Democratization and Ethnic Minorities* (New York: Routledge, 2014), pp. 58–82, at pp. 68–76.

[90] Sharon Wolchik, "The Impact of Institutional Factors on the Breakup of the Czechoslovak Federation," in Michael Kraus and Allison Stanger, eds., *Irreconcilable Differences: Explaining Czechoslovakia's Dissolution* (Lanham: Rowman & Littlefield, 2000), pp. 87–100.

leaders evolved into a demand for an independent state, which the Czech side—perhaps surprisingly, perhaps not, in view of the Slovak veto that could be exercised on alternative arrangements—rather easily conceded. Indeed, the most persuasive analyses of these events view them as being shaped by the veto, without which the dissolution would not have occurred.[91]

So, was this a velvety-smooth Slovak secession, or was it an agreed partition? The veto is by no means standard equipment of federalism.[92] Although I list Slovakia later as a secession, I think the evidence favors partition, but I shall soon point out again that the lines between secession and other phenomena, especially partitions and irredentas, are sometimes less clear than commonly assumed in the literature.

Secessions after Communism

Beyond the Soviet, Yugoslav, and Czechoslovak cases, a small number of newly independent states were created after 1989. Neither federalism nor regional autonomy, nor the institutional features of either, can account for the incidence or success of these movements. In the next chapter, I attempt to explain the strong secessionist movements in these cases. The success—but not the ambition to secede—of these new states is due to significant foreign military assistance or the mutual consent of the departing region and the government of the overarching state, soon to be left as the rump state.[93] That consent, to departure or to a referendum to decide the question, is frequently granted after bitter and protracted warfare.

Some further changes of political control of territories formerly incorporated in either the Soviet Union or Yugoslavia could plausibly be considered secessions. Abkhazia, South Ossetia, and Kosovo involved separation not *of* a former constituent republic but subsequently, by an autonomous or formerly autonomous region, *from* such a constituent Soviet or Yugoslav republic—Georgia in the Abkhaz and Ossetian cases, Serbia in the Kosovo case. There is a strong argument for excluding Abkhazia and South Ossetia from the

[91] For the details, see Petr Kopecký, "From 'Velvet Revolution' to 'Velvet Split': Consociational Institutions and the Dissolution of Czechoslovakia," in ibid., pp. 69–86, and Daniel Kroupa, "A Comment on Čarnogurský and Pithart," in ibid., pp. 235–39, which provide a quite compelling picture of the forces shaping events preceding dissolution.

[92] It is a consociational device, sometimes utilized in constitutional arrangements for severely divided societies.

[93] In the Yugoslav case, with the dissolution of the federation in the form of multiple secessions coming thick and fast upon each other, the rump Yugoslav army did not initially have the same advantage as a central government's army confronted with only a single secession of a single region. Even so, Slovenes, Croats, and Bosniaks required imported arms, as we have already noted. When the brief Slovene war of secession ended, reports circulated that Slovenes sold surplus weapons to Croatian and Bosniak forces.

list. Neither is a truly independent country. Both are the product of Russian armed intervention in 2008 and a continued Russian military presence. In both, Russia has acted as a revanchist state, reintegrating bits of the broken Russo-Soviet Empire by pulling the territories back from control by a former republic with fewer affinities for Russia. But perhaps the enthusiasm of each for withdrawing from Georgia ought to be regarded as determinative in characterizing these splits. So, are these secessions or irredentas? Perhaps they should be considered hybrids. Both wanted to end Georgian suzerainty, and Russia took advantage of that wish by bringing them back under its protection—and its imperial control. Kosovo has a stronger claim to secessionist origin, not as a result of federalism or powers conferred by a federal state, however, but because of a major change in the internal balance of power in Yugoslavia, as I shall explain soon.

Transnistria, a strip of land excised from Moldova by Russian arms, is a much stronger case for irredentism rather than secession, because it is plainly subject to Russian rule.[94] Nothing like the same can be said of Kosovo. Aided by a NATO intervention, Kosovo's secessionist movement from Serbia was internally generated and produced an independent state, albeit one supported by international forces.

In enumerating these secessions (see Table 3.1), we are not limited to those territories that have achieved *de jure* status or widespread legal recognition. We are concerned here with *de facto* control of the secessionist territory. In Table 3.1, arranged chronologically, there is, in appropriate cases, the letter **A** for armed assistance from another (usually neighboring) country, the letter **C** for mutual consent (sometimes merely tacit) of the secessionists and the rump state, and the letter **R** for cases in which a referendum finalized the secession.[95] An asterisk is added to the four cases that do not derive from the dissolution of the Soviet Union, Yugoslavia, or Czechoslovakia.

It is certainly possible to quibble with the list. If Slovakia should be considered a mutually agreed partition, what about South Sudan? Its referendum on secession was mutually agreed a decade in advance, but—crucially—only after protracted secessionist warfare, as was that of Timor-Leste. There is no escaping the close, sometimes ambiguous relationship of secessions with

[94] A point brought home to me by a remark of the putative Russian ruler of Transnistria, replying to a polite intervention by a Moldovan diplomat at a meeting I attended in The Hague, called by the OSCE High Commissioner on National Minorities in the mid-1990s to foster conciliation. If Moldova sought to reverse the separation of Transnistria, the viceroy asserted in a most undiplomatic way, it would have to face the firepower of the 14th Russian Army, which had been instrumental in solidifying the separation of Transnistria in 1992. For the sometimes-hazy lines between secessions and irredentas, see Donald L. Horowitz, "Irredentas and Secessions: Adjacent Phenomena, Neglected Connections," in Naomi Chazan, ed., *Irredentism and International Politics* (Boulder: Lynne Rienner, 1991), pp. 9–22.

[95] For clarity, the list excludes even those former imperial possessions that opted for independence long after others had done so.

Table 3.1 Successful secessions, 1989–2024

Lithuania	1990
Latvia	1990
Estonia	1991
Moldova	1991
Georgia	1991
Slovenia	1991 A
Croatia	1991 A
North Macedonia	1991 C, R
Somaliland	1991 A (from bases in Ethiopia)*
Bosnia-Herzegovina	1992 A
Slovakia	1993 C
Eritrea	1993 A (from bases in Ethiopia), C, R*
Timor-Leste	2002 C, R*
Montenegro	2006 C, R
Abkhazia	2008 A (Russia)
South Ossetia	2008 A (Russia)
Kosovo	2008 A (NATO), R
South Sudan	2011 A (from bases in Uganda), C, R*

Source: Author's enumeration.
* Denotes the four secessions that did not originate in the Soviet Union, Yugoslavia, Czechoslovakia, or in any of their subunits.

agreed partitions. But, again, it is best to be inclusive in this list, in order to test the arguments of the proponents of the view that federalism or regional autonomy encourages secessions.

The list includes 18 secessions. Of these, seven are of republics or autonomous republics that were part of the Soviet Union. Six emerged from the dissolution of Yugoslavia, and one was produced by the dissolution of Czechoslovakia. In accordance with the common understanding of secession, the list excludes former officially designated colonies and countries that emerged from recent mergers of formerly separate territories.[96]

The important point is that only four secessions have followed in the decades after the communist dissolutions. Somaliland, Eritrea, Timor-Leste, and South Sudan are the only cases listed in Table 3.1 that were not associated, even indirectly, with the end of the Soviet Union.[97] Those four secessions occurred between 1991 and 2011. Eritrea was nominally part of a federation

[96] See "Newest Countries 2022," https://worldpopulationreview.com/country-rankings/newestcountries.

[97] Actually, Eritrea's independence was a product of the defeat of the Marxist Mengistu regime in Ethiopia, whose position had been gravely undermined by the end of communism and of Soviet support. That defeat was inflicted by an armed insurgency, coordinated with those of other Ethiopian groups.

but had been illegitimately incorporated into Ethiopia after having been a UN trust territory, with Ethiopia as the trustee. Federalism neither caused nor facilitated its secession. South Sudan emerged from a new federal arrangement created in 2005 that promised a referendum six years later. Federalism was not really implemented in Sudan in that transitional period beginning in 2005. Those six years proved to be merely a way station to a secession that was approved overwhelmingly in a referendum. Somaliland and Timor-Leste had not been incorporated in a federation. The Somalia rump state has since 2012 been attempting to create a genuine federation, with limited success—and none (yet) with respect to reincorporating Somaliland. Timor-Leste had been a Portuguese territory invaded by Indonesia in 1975 after it had declared its independence. Nothing in the trajectory of these four countries supports the argument that federalism is conducive to separatism or secession. None of the four was a consequence of secessionist events in the three communist federations; all were the result of civil strife with local origins.[98]

The most recent of these secessions is South Sudan in 2011. The last of the Soviet and Yugoslav secessions occurred in 2008. From 2011 to 2024, there has not been a single additional secession; and if we go back to 1945, it is clear that secession is an event whose rarity has been overcome only by the secessions in Eurasia from 1990 to 1993.

The only question is whether the Soviet and Yugoslav secessions were causally connected to federalism. For reasons previously stated, this is a very difficult argument to make, and it is difficult to make in the case of the breakup of Czechoslovakia as well. The Slovak divorce did break apart a federation, but it was more likely the result of the negotiation process, the previously embedded Slovak veto, a relatively rare feature of a consociational federation, and electoral and party systems that colored it and created the surprise dissolution.[99] If federal arrangements did play a role, it is more probable that the unbalanced two-unit federation was the culprit, rather than federalism as such, that was instrumental in its demise. This general phenomenon I discuss further in the next chapter.

The Soviet and Yugoslav dissolutions show that secessions from federal states or empires begin by utilizing preexisting boundaries. They are containers that secessionists seek to preserve and usually do, even in ethnically heterogeneous states. But, as I have said several times, containers

[98] With one partial exception. The demise of the Soviet Union did gravely weaken the Marxist-Leninist regime of Mengistu in Ethiopia. This weakness contributed to the success of the multiple ethnic insurgencies against it that were willing to support the Eritrean secession.

[99] The collection of essays in Krauss and Stanger, *Irreconcilable Differences*, constitutes an effort to understand the surprising outcome.

are not necessarily causes, and the powers of various units in a federation do not, by themselves, constitute a reason to leave a federation. The Soviet cases constitute a natural experiment because the containers and the powers were the same for republics that did and those that did not choose to secede. When we look closely at the five Soviet secessions, we see remarkably homogeneous histories of prior involuntary incorporation of established nations.

Moreover, the breakup of the USSR along lines of preexisting boundaries made the dissolution go relatively smoothly. It was far preferable to a breakup by warfare over how much territory each successor state can take from the rump state or other neighboring states.

Outside of Yugoslavia, only Somaliland and Eritrea received their independence as a result of military victory without consent of the preexisting regime of the rump state. Both, however, emerged from wider violent conflicts rather than from states whose existing civil and military institutions were intact and able to oppose them. In Somaliland's case, its independence was the result of a civil war, in which leaders were able to separate the former British territory from the former Italian territory that constitutes rump Somalia. In Eritrea's case, the rump regime in Ethiopia was defeated by multiple insurgent movements acting in concert and in agreement that Eritrea could reverse its illegitimate incorporation in Ethiopia by a referendum on secession. The new government of Ethiopia did indeed consent to Eritrean independence. The warfare in Timor-Leste and South Sudan was ended by mutual consent of the regimes in Indonesia and Sudan, respectively, followed by referenda. In fact, 6 of the 18 secessions occurred with the consent of the rump state, and several others emerged because Gorbachev was reluctant to crush them with military force. Warfare alone rarely produces successful secessions, and when it does, it is nearly always with foreign assistance unless several secessionist regions are fighting for independence at the same time, as they were in Yugoslavia and Ethiopia.

Like the previous government in Ethiopia, Serbia was unable to defeat multiple, simultaneous armed movements that produced secessions from Yugoslavia. Five of the six consensual secessions (plus Kosovo, which was not consensual) were confirmed by referenda.[100] Nearly all the remaining secessions were made possible by external assistance, albeit sometimes, as in the first Yugoslav cases, merely by supplying armaments. Many countries are willing to provide some support to armed rebels against a neighboring

[100] Kosovo's referendum was held years before actual independence, which proceeded despite Serbian opposition.

regime, but few are willing to do what India did in Bangladesh against Pakistan—namely, go to war or threaten credibly to do so.

A point worth emphasizing again: In the period after the Soviet, Yugoslav, and Czechoslovak dissolutions, Table 3.1 shows that secession has again become a rare event. Even if we were to add the 10 Soviet republics that were granted their independence without seeking it, all that would show is that the dissolution of the Soviet Union was an extraordinary event at an extraordinary time.

Following years of fighting, Bougainville is scheduled to receive its independence by 2027 after a consensual, non-binding referendum produced an overwhelming majority to leave Papua New Guinea. Secessionist movements in Scotland and Catalonia may be alive, but those in Wales, the Basque country of Spain, and most others in the Western world are not.[101] The role of devolution in fostering or abetting secession or secessionism is unproven.

A good argument can even be made that some of the cases in Table 3.1 are not truly secessions but hybrids or something else altogether. Somaliland may be a temporary separation, pending ultimate reunification with Somalia. As mentioned earlier, Slovakia and South Sudan could be considered mutually agreed partitions, rather than secessions, just as Abkhazia and South Ossetia might be thought to be the results of irredentas. Timor-Leste could be thought of as departing in a delayed fashion from Portuguese colonialism. The lines among these phenomena are not altogether clear.

Montenegro was merely the last of the Yugoslav republics to become independent following the earlier dissolution, but with mutual consent, unlike the others. And Kosovo was a major exception to Badinter's strictures against recursive secessions, because of Serbia's recurrent human rights violations against Albanians in what had been an autonomous region of Serbia and because of the willingness of the West, especially President Bill Clinton's willingness, to use the US Air Force to intervene on behalf of Kosovars.

The extent to which secessions can be explained by notions of the capacity of the secessionists, especially as enhanced by control of federal or regionally autonomous units—a major theme in the literature—is very small. It is actually very difficult to find instances of successful secessionist movements achieving independence by virtue of their own capacities, whether enhanced by generous devolution or otherwise. A comparison of the lack of success of secessionist movements in southern Thailand, the southern

[101] Among regional ethnic movements in western Europe, such as those in Wales and Corsica, and those in Italy, there is greater support for autonomy than for independence. For Corsica, see David S. Siroky et al., "Containing Nationalism: Culture, Economics and Indirect Rule in Corsica," *Comparative Political Studies*, Vol. 54, no. 6 (2021), pp. 1023–57.

Philippines, Iraqi Kurdistan, Baluchistan, Cabinda, Kabylia, or numerous others unsupported by a neighbor willing to go to war makes this clear. The most important sources of secessionist success are armed external assistance or tacit or active consent of the authorities in the state from which they wish to secede, albeit sometimes after protracted violence.

At any one time, there are dozens of armed separatist movements in the world. Very few of them are present in the 25 states listed as federations by the Forum of Federations. Among the 25 member states of the Forum, only about a quarter could be said to have active separatist movements, and only half of those could be said to be armed. Of course, there are many more such movements in countries with unitary or regionally devolved governments, simply because federations are fewer, and separatist movements appear to be increasing,[102] but they are not achieving independence through secession.

Most secessionists settle for a status far short of independence or are defeated militarily. The unlikelihood of their success suggests that the aspirations of separatists can generally be satisfied with something less than secession. Many putative secessionists are actually aiming at regional autonomy or places for rebel leaders in the central government or its rent-seeking apparatus.

Indeed, the infrequent success of secessionist movements in achieving independence, which many potential secessionists must be presumed to understand at the outset, suggests that their separatism is aimed at something else.[103] It is hardly unknown for leaders of a movement to begin with maximal objectives but settle for a fallback position that they anticipated from the beginning or arrived at only when they saw that achievement of the maximal position was infeasible. Once support for their secessionist movement becomes clear to the central government, the ethnic entrepreneurs who lead such movements might find their way into that government or might be allowed to lead their own region *de facto*, especially if it is on the periphery of the overarching state. If they operate in an existing federal system or one in which there are already regionally devolved units, their movement may gain its own federal or otherwise autonomous unit, if it does not already have one. Judged by these achievements, many avowed *secessionists* are actually *concessionists*: they do not seek to leave the overarching state in which they are located—or find it unrealistic to try—but to be awarded a bigger share in it.

[102] See Siroky et al., "Containing Nationalism," p. 1024 and references cited there.

[103] Why, then, do separatists so often declare their objective to be secession? Perhaps to enhance their ability to recruit supporters attracted by the prospect of running an independent state and also enhance their ability to attract military support from neighboring states that can benefit from supplying arms or other assistance against a state with which they have unfriendly relations.

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4

Failed Devolution and the Risk of Secession

If most secessionists are or can be converted into autonomy concessionists, then some central governments have taken a wrong turn, because their actions exacerbate secessionist inclinations. Much warfare that aims at secession or merely federalism or regional autonomy is the result of self-inflicted wounds by central governments. Not the failure of federalism or of regional autonomy, but the failure of central governments to acknowledge the utility of devolution or failure to keep commitments to devolve power, is a source of militant, armed secessionism.

Experiencing what I call a risk factor does not mean that secessionism will inevitably take hold. We shall note that for some groups secession is just not feasible, generally for want of external assistance, and they may vigorously pursue regional autonomy while declaring their objective to be secession. The presence of risk factors does mean, however, that their attachment to the overarching state is reduced, and they are usually willing to use armed force to pursue some form of separate identity: if not secession, then a high degree of autonomy.

This is not the place for a wide-ranging discussion of the causes or facilitating conditions for secession, except insofar as they are asserted to be connected to devolution or the failure to meet demands for devolution. We shall see, however, that many are connected. At the most general level, ethnic discrimination against territorially concentrated groups and the actual or fearfully anticipated denial of equal political participation at the center can and often do contribute to separatism, regardless of the structure of the overarching state,[1] as they did in Bangladesh and in stimulating long wars of secession in, for example, Sudan, Myanmar, Sri Lanka, and Nigeria. Or, to

[1] Regional inequalities are also a frequently cited cause of secessionist sentiment. Christa Deiwiks, Lars-Erik Cederman, and Kristian Skrede Gleditsch, "Inequality and Conflict in Federations," *Journal of Peace Research*, Vol. 49, no. 2 (2012), pp. 289–304; Stefan Wolff, Simona Ross, and Asbjorn Wee, "Subnational Governance and Conflict: The Merits of Subnational Governance as a Catalyst for Peace," World Bank, Washington, DC, 2020, p. 11. Rich regions, as well as deprived regions, often make separatist

simplify, ethno-political exclusion, rather than ethnic federalism, feeds secessionism in states where victims of political discrimination are clustered in particular territories.

There are, however, other recurrent patterns of governmental behavior that impel ethnic groups to aim at departure from the state or, if that proves impossible, maximal self-government within it. Among these secessionists are groups that are victims of (1) illegitimate, usually forcible, incorporation of their territories into a federation or unitary state or empire, as we have witnessed, leading to an enduring desire of those groups to escape; or (2) unfavorable changes in ethnic power balances at the center, which we have also observed; or (3) inapt territorial configurations; or (4) withdrawal of devolved power; or (5) long delay, extremely protracted and unproductive negotiations, or lack of fulfillment of commitments to devolution. As we shall see in Table 4.1, all of the secessions from 1990 onward that are enumerated in the previous chapter can be accounted for by one of the five causes just named and, in some cases, more than one such cause. We shall also see that these causes are usually interrelated. More than one may be motivating an attempt to secede. Note, too, the asterisk showing that had there been no dissolution of the Soviet Union, Yugoslavia, and Czechoslovakia, there would have been only 4 cases of secession, instead of the 18 listed. It is, however, important to emphasize that the causes of those 4 are the same as those identified for the 14 that followed the dissolution of the 3 communist federations and had nothing to do with any empowerment of regions or any endowment provided by federalism.

Illegitimate incorporations can last a long time, but the memory of them, especially if they were accompanied by violence, can be equally durable, as they were in the Soviet Union. The animating force is a persistent sense of historical injustice, aggravated by unequal treatment by the incorporating overlords. By contrast, changes in power balances may occur suddenly and produce radical reassessments of the desirability and opportunity to secede, as they did in Yugoslavia. Inapt territorial configurations may hardly be a source of conflict until a crisis makes them seem highly pertinent to the disadvantaged side that opts for exit. Withdrawal of devolved power may or may not occur soon after the power has been granted. Most striking of all is that when we speak of long delay, protracted negotiations, or lack of fulfillment in granting devolved authority, we may very well be speaking of decades.

demands, especially if they can claim that the wealth of their region has been unfairly appropriated by the central government or by ethnic opponents.

Of 68 ethnic civil wars between 1945 and 2004, nearly half (45.6 percent) lasted more than 10 years.[2] Indeed, in multiple countries—for example, Myanmar, the Philippines, Western Sahara, Papua, and Sudan—the warfare, punctuated by delay, negotiations, and lack of fulfillment, has taken as much as a half-century or more before playing out, as it did after 55 years for South Sudan, or without final resolution, as it has in the other countries. (Western Sahara and Papua also have claims of illegitimate incorporation, and Papua has also experienced scaled-back devolution commitments.) In Sri Lanka, the war lasted a mere! quarter-century, and a serious regional autonomy formula for the Tamils was still pending a decade and a half later. In dealing with these, it will be necessary to detail the sequence of events in individual countries by means of narrative accounts, in order to understand the interplay between governments and separatists and lay the foundation for an examination of commitment and reneging with which the chapter concludes.

Table 4.1 enumerates the causal conditions for all successful secessions between 1989 and 2024.

The five conditions I have mentioned, not devolution or its consequences as such, tend to feed secessionism or, if secession is infeasible, the aggressive, frequently violent, pursuit of a high degree of regional autonomy. All of these conditions impel groups to consider leaving the state to which they are unhappily attached. But for such a move to succeed, more is needed. Changing circumstances, such as weakness of the center, or a surprising willingness of the center to consent, or the availability of outside armed support, or—especially—the progressive dissolution of the state or empire, also *permit* them to leave the state to which they are unhappily attached. The fifth condition is a bit different. Long delay in attaining devolved power or lack of fulfillment by the state of commitments to devolution requires a depiction of a negotiating environment in which firm commitments become unattractive in the calculations of the state actors or the secessionists, or both, and we shall discuss this at the end of the chapter, after considering a number of such instances of total or partial reneging.

Of course, not every regional ethnic group whose condition can be depicted in one or more of these five terms engages in secessionism. As we proceed, I shall try to identify and explain some negative cases, by which I mean to include those which did not eventuate in secession or in secessionist movements. The explanation for these is usually overwhelming force favoring the central government, weakness of the separatist region deriving from its heterogeneity or lack of external assistance, or willingness of the

[2] Shanna A. Kirschner, "Knowing Your Enemy: Information and Commitment Problems in Civil Wars," *Journal of Conflict Resolution*, Vol. 54, no. 5 (2010), pp. 745–70, at p. 753.

Table 4.1 Causes of successful secessions, 1989–2024

Lithuania 1990	Illegitimate incorporation
Latvia 1990	Illegitimate incorporation
Estonia 1991	Illegitimate incorporation
Moldova 1991	Illegitimate incorporation
Georgia 1991	Illegitimate incorporation
Slovenia 1991	Changing internal balance of power
Croatia 1991	Changing internal balance of power
North Macedonia 1991	Changing internal balance of power
Somalia 1991	Changing internal balance of power*
Bosnia-Herzegovina 1992	Changing internal balance of power
Slovakia 1992	Inapt configuration†
Eritrea 1993	Illegitimate incorporation*
Timor-Leste 2002	Illegitimate incorporation*
Montenegro 2006	Inapt configuration‡
Abkhazia 2008	Withdrawal of devolved power
South Ossetia 2008	Withdrawal of devolved power
Kosovo 2008	Changing balance of power/withdrawal of devolved power
South Sudan 2011	Long delay/lack of fulfillment*

*Denotes the four secessions that did not originate in the Soviet Union, Yugoslavia, Czechoslovakia, or in any of their subunits.
†Inapt configurations involve uneven power balances between two units. In Slovakia and Montenegro, they portended an unfavorable balance of power. In each, the smaller unit opted to leave the federation. More on this in the chapters to follow.
‡See previous note.
Source: Author's enumeration.

proto-secessionists to accept a lesser resolution of their claims, typically regional autonomy.

Illegitimate Incorporation

John McGarry and Brendan O'Leary have observed that federations voluntarily established are more likely to prove stable than those established without the consent of minorities included in them.[3] By illegitimate incorporation, as we have already witnessed, I mean acquisition of

[3] John McGarry and Brendan O'Leary, "Federation as a Method of Conflict Regulation," in Sid Noel, ed., *From Power Sharing to Democracy: Post-Conflict Institutions in Ethnically Divided Societies* (Montreal: McGill-Queens University Press, 2005), pp. 263–96, at p. 286.

the territory by conquest or by clear violation of lawful commitments. Populations of illegitimately incorporated units, such as the Baltic states, rarely abandon their desire to resume or achieve their independence, whereas central governments rarely acquiesce in their departure, except occasionally at times of regime change. All seven secessions of illegitimately incorporated territories listed in Table 4.1 occurred during such periods: in Ethiopia and the Soviet Union in the early 1990s and in Indonesia in the late 1990s to early 2000s. And in all but the Ethiopia-Eritrea instance, the central governments were hardly unequivocal about letting go.

Beyond those cases, there are many instances of illegitimate incorporation, *realpolitik*'s being what it is. Most such territories have been acquired by much more powerful countries, which explains why many such secessionist movements remain quiescent for long periods. Despite this, some fight on. These claims can be remarkably durable.[4]

Timor-Leste was a Portuguese colony invaded and annexed by Indonesia in 1975. After a quarter-century of resistance, it achieved independence after B. J. Habibie, the successor to Indonesia's President Soeharto, agreed to a referendum in which the East Timorese voted to leave Indonesia.[5]

Papua's illegitimate incorporation has produced a persistent secessionist movement. A former Dutch colony comprising the western half of the island of New Guinea,[6] Papua was incorporated into Indonesia as a result of the threat of military action, followed by a UN inquiry into Papuan opinion in the form of an "Act of Free Choice." After Indonesian independence in 1949, its government demanded that all Dutch possessions in the archipelago must find their place in Indonesia. The Dutch had other ideas. On the ground that Papuans comprised a separate people, the Netherlands had been preparing the territory for independence, which in the early 1960s Sukarno threatened

[4] Abkhazia had a remote version of this claim with respect to its incorporation in Georgia. Its first president, Vladislav Ardzinba, a historian of ancient civilizations, made claims that Abkhaz had preceded Georgians in the area that became Abkhazia and so were entitled to a preeminent position there. (I heard him make such statements, to the visible and audible distress of the deputy foreign minister of Georgia seated next to me, at a meeting in the office of the European Union High Commissioner for National Minorities in The Hague in 1994.) During and after the war with Georgia in 1992–93, Abkhaz violently expelled Georgians from their territory. Georgia itself had a claim of illegitimate incorporation in the Soviet Union, as I have pointed out.

[5] A result not readily accepted by Indonesian forces. Army units and local militias engaged in atrocities and violence against people and property on a massive scale. The United Nations (UN) Security Council then voted to establish a peacekeeping mission consisting mainly of Australian forces. The decision to authorize the referendum may have cost President B. J. Habibie, who had succeeded to the presidency upon Soeharto's resignation, the chance to stand for election as president. His "accountability speech" was rejected by the Indonesian supra-legislature at the time, which, by informal understandings, rendered him ineligible to stand for election.

[6] The eastern half of the island was an Australian colony, now Papua New Guinea.

to oppose with force. A UN mediation effort, propelled by the United States, secured agreement to a gradual transfer of the territory to Indonesia. In fact, there was little choice and not much freedom in the Act of Free Choice, since the participants were hand-picked proponents of joining Indonesia. The Indonesians refused to countenance even extensive autonomy until many years later. A Free Papua movement has been fighting the Indonesian government, off and on, for half a century.

As we also saw earlier, since Western Sahara was invaded in the mid-1970s and later annexed by Morocco, Polisario guerrillas have been committed to its independence. Negotiations over its status have repeatedly failed, and in 2020 Polisario decided to renounce a 29-year ceasefire and resume its resistance. Bakongo in the former Portuguese territory of Cabinda that is claimed by Angola have also fought on.

Notice that these illegitimate incorporations go back 50 years or more. They are a long-duration risk factor for secession, which may or may not come to fruition. Of course, not all such incorporations produce secessionist movements. Some, such as Puerto Ricans, are internally divided because the conditions of their incorporation contain some benefits, in tax exemptions and rights to migrate,[7] while others, such as Goans, whose former Portuguese territory was invaded by India and who now enjoy statehood in the federation, have acquiesced to their post-incorporation condition. Yet many such groups await an opportunity to make good their exit.

Changing Power Balances

Changing power balances may arise suddenly and require a quick response, failing which disadvantaged regions may be repressed for long periods. The dissolution of the Yugoslav federation was greatly accelerated by the ascendancy of Milošević in Serbia and his ability to pack the Yugoslav Presidency Council (in which each republic, including the autonomous republics, had had a vote) with his supporters in Montenegro, Kosovo, and Vojvodina, thereby transforming what had been an institution able to balance group representation—and so cabin Serb power—into one that greatly enhanced support for the Serb leader. Milošević's many ethnocentric provocations angered the leaders of the Slovene and Croat republics and solidified their determination to proceed to independence. These were secessions that were made possible by the strength of ethnic units in the federation, as we have

[7] For some of the benefits, see Lapidoth, *Autonomy*, p. 131. Subventions from Paris may similarly explain the relative quiescence of Corsica.

already seen, but they also grew out of the failure of federal balances at the center that threatened those units and a new balance of four votes to four in the collective presidency that threatened to favor the Serbs, or at least to stymie the claims of other republics.

Notwithstanding the Badinter Committee's determination that there could be no further secession from units at the republic level, the capacity of Yugoslavia's federal units to secede whole was inadequate to accomplish that cleanly. Slovenia, relatively homogeneous, seceded whole, but there was warfare in Serb areas of Croatia, especially over Krajina, a Serb-majority territory that looked for a time as if it might be able to depart from Croatia. Bosnia had a bitter war, terminated by the division of Bosnia into a Republika Srpska and a Bosniak and Croat Federation. Despite Serb threats to secede, this uneasy arrangement has been held together with difficulty by European and American organizations and forces in Sarajevo. And, as I have noted, there was the later secession of Kosovo from Serbia itself. If power balances are disrupted, recursive secession cannot be ruled out.

The changing ethnic configuration of the Yugoslav rump state was crucial in fostering its dissolution. Once the Slovenes and Croats began their secessions in response to augmented Serb power at the center, a new question about Yugoslavia's federal configuration was raised for the groups left behind: whether to remain in a rump federation in which the balance of ethnic forces had been greatly altered in the direction of Serb hegemony, a dangerous development in the light of the conflictual history of the region. The Yugoslav events that followed the Slovene and Croat determinations to leave the state were the results of the collapse of the overarching state because of a reconfiguration of power relations within the federation and a greatly enhanced threat of ethnic domination from the group in charge at the center.[8]

The same issue had arisen in Nigeria in 1967 as a result of the attempted secession of Biafra, because the departure of the Igbo-dominated Eastern Region, if successful, would leave the Hausa-Fulani even more dominant in a smaller Nigeria. Wartime leaders of the Nigerian Federation, especially General Yakubu Gowon, a northern Christian from a small minority group, took steps to reassure remaining ethnic groups in the country and to reinforce the status and influence of those groups, lest they were to become disaffected.

As I have explained earlier, these measures, especially the creation of 12 new states in place of the 4 regions, were important to other groups, who feared the supremacy of the Hausa-Fulani once the Igbo had departed. It

[8] Liam Anderson says correctly that ethnicity, rather than ethnofederalism, was responsible for the demise of the communist ethnic federations. Liam Anderson, "Ethnofederalism: The Worst Form of Institutional Arrangement?" *International Security*, Vol. 39, no. 1 (Summer 2014), pp. 165–204, at p. 177.

was crucial to the survival of Nigeria that the Yoruba, who were debating the merits of secession among themselves, did not follow the Igbo out of the federation. (The Yoruba and Igbo together comprised one third of the country's population and had created a great deal of its economic dynamism.) The Yoruba needed to be convinced that others would not also attempt to secede. For that reason, holding onto the loyalty of the Middle Belt minorities (mostly non-Muslim) in the Northern Region, who were well represented in the army, was crucial. It was important, too, that the former Eastern Region minorities, notably Efik and Ijaw, be rewarded for their continuing opposition to the Igbo attempt to control the whole Eastern Region. Under these circumstances, demands for new territorial units, previously denied by the British and by the independent successor government, were granted, and the fear of Hausa supremacy in what would have become rump Nigeria was simultaneously reduced.

Because Nigeria's reconfiguration of boundaries made Hausa-Fulani domination much more difficult to accomplish, it prevented a cascade of secessions. The failed Igbo attempt was not replicated. Nor was there the emergence of a new and unfavorable balance of power for groups choosing to remain in Nigeria. No such reassurance was available in Yugoslavia. It was already going in the opposite direction, as the threat from the Serb leader grew and one secession was quickly followed by another.

Russia's solution to this problem, when confronted with the early secessions of the Baltic states and Moldova, was to declare the Soviet Union dissolved altogether. By that method, it was able to sponsor the creation of a Commonwealth of Independent States, in which a more subtle form of domination might be established over those republics in which secessionist movements had not emerged. Significantly, its headquarters was outside Russia, in Minsk in Belarus. The softer form of domination would have been appealing to those leaders in the Central Asian republics, as well as in Armenia, Azerbaijan, and Belarus, who were still dependent in various ways on Moscow and would be advantaged by at least a gift of independence. A perhaps less intrusive Russia solved in advance the problem presented in Nigeria and Yugoslavia by the departure of some that left those remaining more vulnerable to predation. All five of the Soviet secessionist states departed early because of their previous illegitimate incorporation in the USSR, whereas the first wave of Yugoslav secessionists departed more gradually, after advocating weaker forms of federation. Their secessions were not based on illegitimate incorporation but on the balance of power that was changing in favor of Serbs.

The secession of Somaliland was also a response to changing power balances. The union in 1960 of the former Italian and British colonies had

initially gone well. Under the regime of President Abdirashid Ali Shermarke, who had made his early career in the former Italian-controlled South, the prime minister was a northerner, Muhammad Haji Ibrahim. Shermarke was assassinated in 1969, and two days later the army commander Mohammed Siad Barre took power in a military coup. Barre's regime proved to be quite brutal and biased in favor of Barre's own southern Darood group,[9] the largest in the country, and especially in favor of his own Marehan subgroup. Members of the Isaaq group, who form a majority in the North, became targets of Barre's regime. In 1987–89, large numbers of Isaaq, by some estimates in the hundreds of thousands, were killed by Barre's forces. The great change from what had, before the coup, been called equitable "clan balancing" in Somalia to Darood exclusivism was the prelude to the secession of the North in 1990 and after.[10]

In unusual instances, the threat of rapid changes in ethno-political balances can also produce not just secessions but expulsions of groups and territories initiated by those in control of the state. The prospect of such changes was at the root of the expulsion of Singapore from the Malaysian Federation in 1965.[11]

In the run of federal states, the hegemonic behavior of a single large group (Hausa-Fulani, Serbs, Darood) is not present to the same degree, and certainly not at a critical juncture in the legitimacy of the overarching state. Where it is, it very often ignites a burning desire to leave the state, as we have seen, but where that is impossible some groups may settle for half-measures, as we shall also see.

Inapt Configurations

There is no single optimal configuration of devolved units, but serious disproportions in the size of regional groups and polarized identities of a few federal units are especially important in creating conditions for secession. Bipolar conflicts tend, when they arise, to be more intractable than

[9] The term for such groups among Somalis is clan, but Somali clans are functionally similar to ethnic groups in politics.

[10] See Markus V. Hoehne, "Against the Grain: Somaliland's Secession from Somalia," in Lotje de Vries et al., eds., *Secessionism in African Politics* (London: Palgrave, 2019), pp. 229–61.

[11] Within a year of the creation of Malaysia by the incorporation of Singapore and two Borneo territories with Malaya, Lee Kuan Yew, prime minister of Chinese-majority Singapore, began to confront the Malay leadership of the country with his advocacy of "a Malaysian Malaysia." The slogan was meant to suggest that the current polity was weighted toward Malay supremacy (a Malay Malaysia) that neglected the interests of minorities, especially the Chinese. The result was great hostility on the part of the Malay political elite, rising tension and violence, including anti-Chinese riots, instigated by some Malay politicians, in Singapore, and a general sense that an attempt at radical change in the ethno-political balance would be very dangerous. It was in this environment that the Malaysian leadership summarily expelled Singapore from the federation.

multipolar conflicts are.[12] Pakistan had realigned its four provinces in the west in the 1950s into a single unit, in order to match East Bengal, with its greater population. We have seen the result when a Bengali party won a majority of seats in the 1970 general election: a deeply polarized conflict between the western and eastern wings of the country that led to the secession of Bangladesh. Bipolar federations are, in general, a bad idea.

Henry E. Hale has also called attention to the significance of a "core ethnic region," a single unit of a federation with either a majority of a state's population or a considerably greater population than other units.[13] The Soviet Union and (perhaps more problematically) Yugoslavia, he notes, both had core units, as did First Republic Nigeria, which also experienced a secessionist war. Core units, he argues, create fear in smaller units, because the central government must attend disproportionately to their demands. In First Republic Nigeria, the Hausa-Fulani, with their ability to coopt or coerce others in the North, succeeded through elections in dominating the South. If there is no core unit, domination is less likely, and if a large group is divided into several units, then collective action problems will probably impede its ability to dominate.[14]

As all this suggests, threats from the center or from the largest unit, which may control the center, are likely to have far more responsibility for stimulating secession than are capacities that are lodged by federalism or regional autonomy in the smaller units. If secession occurs in a federal state, as I have intimated already, it is likely to occur along the lines of the existing federal units, but—to repeat, just one more time—that is not the same as saying that the powers conferred on those units make secession more likely.

Bipolarity and gross disproportions in power between a core region and others are certainly risk factors, but they are not the full explanation. We have already seen that changing power balances can precipitate departures from the state. Slovakia's and Montenegro's departures exemplify the risk. As this treatment of power balances suggests, it is possible to see inapt bipolar or lopsided configurations as related to changing power balances. Indeed, there is

[12] José G. Montalvo and Marta Reynal-Querol, "Ethnic Polarization, Potential Conflict, and Civil Wars," *American Economic Review*, Vol. 95, no. 3 (2015), pp. 796–816; see Brian D. Shoup, "Ethnic Redistribution in Bipolar Societies," *Perspectives on Politics*, Vol. 9, no. 4 (2011), pp. 785–802.

[13] Henry E. Hale, "Divided We Stand: Institutional Sources of Ethnofederal State Survival and Collapse," *World Politics*, Vol. 56, no. 2 (January 2004), pp. 165–93.

[14] Hale asserts that since 1945, no federal state without a core ethnic unit has dissolved or experienced large-scale civil war. This extension of the analysis is more problematic for analyzing secessions. Perhaps Serbia was such a core unit, although Serbs were only 36 percent of the Yugoslav population in 1991. West Pakistan, however, was not a core unit, as East Pakistan had 55 percent of the country's population in 1971. No region of Ethiopia could meet the criteria advanced for a core region, as the politically powerful Amhara were not the largest group when Eritrea departed in 1991. The largest group are Oromo, at about 35 percent.

often considerable overlap between the two risk factors, as an inapt configuration can allow an agglomeration of power that disadvantages some groups. The attempt of Igbo to secede from Nigeria in a new state called Biafra was a reaction to the ill-treatment and massacres suffered on more than one occasion by Igbo at the hands of northerners. A similar impulse animated Bengalis in their reaction to the refusal of compatriots in West Pakistan to give effect to their victory in the elections of 1970. In both cases, inapt configurations conferred power that produced a secessionist reaction.

In both Slovakia and Montenegro, the road to secession was not paved with interethnic hostility on anything like the same scale—far from it—but the two-sided shape of the federation inevitably raised the stark question of which side would have more power. In both, the side with less power chose to leave. Slovaks did not favor secession at the time their leaders chose it, and affinities between Serbs and Montenegrins remained close throughout the secession process—witness Serbia's consent to Montenegro's departure after a very narrow referendum result. In both, it was secessionist elites who took the opportunity to lead new countries. Just as Slovak leaders made the first moves toward separation, Montenegro's political elite was heavily invested in the success of the referendum. Montenegro's prime minister had threatened to resign if the referendum result had been less than 50 percent.

These bipolar cases tell us, perhaps, that opportunistic leaders of smaller units in a federation will take the opportunity to lead a secession when an opening presents itself during a period when the power configuration of the regime is an open question, even if mass support, so obvious in other secessionist cases, is quite modest.

Withdrawal of Devolved Power

Because the inclination of political leaders to devolve power and to accept offers of devolution is variable over time, withdrawal is also a feature of the final risk factor we shall consider in the next section: long delay or lack of fulfillment of commitments to devolution.

The withdrawal of devolved power and increased repression of minorities recurrently produce secessionist sentiment. Groups that formerly enjoyed regionally autonomous status are much more likely to attempt secession than those that never had such a status or those that have it currently.[15]

[15] David S. Siroky and John Cuffe, "Lost Autonomy, Nationalism, and Separatism," *Comparative Political Studies*, Vol. 48, no. 1 (2015), pp. 3–34. See also Micha Germann and Nicholas Sambanis, "Political Exclusion, Lost Autonomy, and Escalating Conflict," *International Organization*, Vol. 75, no. 1 (2021),

Even unequivocal grants of autonomy—not merely promises—have eventually been retracted after years of enjoyment. That was certainly true in Eritrea, beginning shortly after the formation of its federation with Ethiopia in 1952 and culminating in the withdrawal of federal status and full absorption in a unitary Ethiopia in 1962. Separatism in Kosovo followed the same course as disintegration did in the rest of Yugoslavia. It grew as fear of Serb hegemony grew. Changing power balances certainly played a major role. Kosovo was not a Yugoslav republic but only an autonomous region within Serbia. There were Serbs in the region whom Milošević claimed to be protecting. Even so, secessionism accelerated greatly after regional autonomy was effectively withdrawn in 1989 and repressive measures were taken against the Kosovars.[16]

The same was true for Abkhaz and South Ossetians, whose autonomy was withdrawn in Georgia after Georgia became independent. With recrudescent Georgian nationalism very much on the rise in the years before and around the time of the dissolution of the USSR, the Georgian government began to take steps to reduce the autonomy of both regions—for example, in the field of language. A draft law in 1989 would have made Georgian the exclusive official language.[17] Abkhaz and South Ossetians believed the safer course was to remain in the Russian sphere and began to agitate for independence from Georgia.

In the first instance, therefore, one could see these as minor cases of changing power balances that fostered secessionist sentiment, but soon Georgia was moving toward dissolving the autonomy of the two regions entirely. Georgian determination to leave the USSR had been solidified by the violent dispersion of a Georgian demonstration by Russian troops that left 20 dead in April 1989.[18] Once this occurred, a series of cultural and historical disputes broke out within Georgia. Were the first inhabitants of Abkhazia Georgians or Abkhaz? Did the Soviets initially award autonomy to Abkhazia and South Ossetia in order to prevent the emergence of an independent Georgia? And if so, was it not necessary for Georgia to reverse the grants of autonomy?[19] By this time, the Abkhaz and South Ossetians had decided to declare their own

pp. 178–203. Others have pointed out that reducing the authority of devolved regions is likely to exacerbate conflict. See, e.g., Katherine Adenay, "Does Ethnofederalism Explain the Success of Indian Federalism?" *India Review*, Vol. 16, no. 1 (2017), pp. 125–48.

[16] Dick Leurdijk and Dick Zandee, *Kosovo: From Crisis to Crisis* (London: Ashgate Publishing, 2001), p. 174.

[17] George Hewitt, *Discordant Neighbors: A Reassessment of the Georgian-Abkhaz and Georgian-South Ossetian Conflicts* (Leiden: Brill, 2013), pp. 57–63. At about the same time, similar laws were passed by titular majorities in some other republics, prompting dissents from minorities in those republics.

[18] Ibid., p. 64.

[19] Ibid., p. 67.

independence and, anticipating Georgian independence, to align with Russia and become part of what remained of the Soviet Union, to avoid continued incorporation in Georgia.[20]

Georgia, of course, found these declarations to be unlawful and abrogated the autonomy of both regions. Thereafter, two wars, punctuated by failed ceasefires and a Russian intervention on the side of the Abkhaz and South Ossetians in 2008, severed the regions' ties to Georgia and tied them to Russia.[21] Secessionist sentiment in the two regions was not the product of creating autonomous institutions but of crushing those institutions.[22]

Had Georgian nationalism not turned inward, adversely affecting the two autonomous republics, in both of which there were substantial Georgian populations—as of 1989, Georgians were well over twice as numerous as Abkhaz within Abkhazia and comprised 29 percent of the total population within South Ossetia—and had Russia not made clear it would side with the Abkhaz and South Ossetians, their secessions would have been both unmotivated and infeasible. These, then, are instances of changing power balances inside Georgia *and* lost autonomy, both of which are risk factors for secession.

Indeed, withdrawn autonomy is a major variant of changing power balances. Both seem akin to what behavioral economists call loss aversion.[23] Both provide a strong spur to separate when that is possible.

In Nicaragua, the failure of the Sandinista regime to grant certain cultural and land rights to the Miskito minority in the early 1980s gave rise to an armed Miskito movement that eventually accepted an offer of autonomy. It took years to agree on the extent and form of that autonomy. Even after its establishment, there was great difficulty in implementing it; and there were periods when concessions were reversed, in each case producing violent resistance to the reversal. The central government recurrently provoked separatist demands.[24] Withdrawal of autonomy is a common source of resentment and renewed conflict.

Withdrawal of autonomy is common in asymmetrical federal relations, those created as exceptions to accommodate distinctive single regions. Where

[20] Ibid., pp. 69–93.

[21] Ibid., pp. 94–251.

[22] For more on the Georgian cases, see Bruno Coppieters, "War and Secession: A Moral Analysis of the Georgian-Abkhaz Conflict," in Bruno Coppieters and Richard Sakwa, eds., *Contextualizing Secession: Normative Studies in a Comparative Perspective* (Oxford: Oxford University Press, 2003), pp. 187–212. For a different view, see Svante Cornell, "Autonomy as a Source of Conflict," *World Politics*, Vol. 54, no. 2 (2002), pp. 245–76.

[23] Amos Tversky and Daniel Kahneman, "Loss Aversion in Riskless Choice: A Reference-Dependent Model," *Quarterly Journal of Economics*, Vol. 106, no. 4 (1991), pp. 1039–61.

[24] Caroline Hartzell, "Nation-State Crises in the Absence and Presence of Segment States: The Case of Nicaragua," *Ethnopolitics*, Vol. 13, no. 1 (2014), pp. 28–47.

one area is granted special powers in an otherwise unitary state or in a federal state in which other units have symmetrical powers, the temptation of the center—compelled to make special provision and fortified by resentments in other areas that lack special powers—to scale back asymmetrical powers may be irresistible.

As Milošević's behavior in Kosovo illustrates, withdrawal of devolved power may serve the needs of central government politicians who are attempting to cultivate their own ethnic clientele.[25] Furthermore, the prospect of violence, far from deterring withdrawal, may make it more attractive to central-level politicians as a demonstration of the ill will ostensibly harbored by the group occupying the devolved territory. Of course, genuine fear of the intentions of the group benefiting from devolution may constitute the motivation for withdrawal of autonomy, but sometimes the motivation lies in the desire of politicians at the center to signal their devotion to a cause. The two motives are not mutually exclusive.

Because unitary states that encounter demands for federalism or regional autonomy rarely produce quick decisions to devolve power, devolution negotiations sometimes have a long history that colors the possibility or the shape of a devolution scheme. As decision-makers think and rethink the desirability of devolution and its forms, they are not writing on a blank slate. This means that the decision does not simply reflect the merits of devolution as of the moment it is made, for it may not be a straight-up function of preferences, conditions, costs, and benefits at that moment. Such decisions are instead the product of what Paul Pierson perceptively calls long-term causal chains.[26] And, over time, lessons may be learned or conclusions drawn or re-drawn, expectations may be created and disappointed, conditions and preferences may change, or the sides may lock themselves into positions that rule out some courses and rule in others—all of which may have a bearing on what commitments may finally emerge and whether their capaciousness is informed by optimism or limited by apprehension.

Withdrawal sometimes derives from regret on the part of decision-makers, often coinciding with a change of regime or a change of personnel. Consider the behavior of Myanmar and Indonesia, both of whose governments made generous promises of autonomy, only to withdraw or greatly modify them later, thereby precipitating or intensifying long periods of secessionist violence. In both, the debates, decisions, and reactions to them were, in

[25] In the Serbian case, the Serb minority in Kosovo was in conflict with and feared the Albanian majority there.

[26] Paul Pierson, *Politics in Time: History, Institutions, and Social Analysis* (Princeton: Princeton University Press, 2004).

significant part, products of keenly recollected history that provided a lens through which to view ongoing events. In both, that history goes back to the end of the colonial period. In both, the generosity of the regime proved to be limited, and the reaction of those affected by it has been a long course of violence.

Burmese minorities had often fought on opposite sides from the Burman majority during World War II. In their quest for independence, many Burmans had sided with the Japanese, whereas quite a few minorities, such as Karens, Chins, and Kachins, had fought with the British, producing small Burmese wars within the larger war, with post-war consequences. Attacks by Burmans on civilians, for example, had provided the motivation for a secessionist movement as independence approached.[27] In 1947, on the eve of independence, the Panglong conference and resulting agreement between Burman leadership and most minorities provided strong commitments for minority rights, including federalism and even a nominal right for certain groups to secede.[28]

The 1947 constitution, however, was disappointing: it created only a weak federal system. After the assassination of the Burman leader Aung San later that year and U Nu's accession to the prime ministership of independent Burma, accommodation of the minorities was reversed, and the constitution was at first interpreted to create what became, *de facto*, a unitary regime that was later replaced by a clearly unitary constitution. Loss aversion was richly on display and still is. References to the commitments of Aung San at Panglong remain common among Myanmar's ethnic minorities.

Decades of warfare followed. At the Taunggyi conference of 1961, all minority delegates pressed for a reversion to Aung San's federal promise of 1947, but Burmans resisted. The minorities demanded an upper house based on equality of federal units, but the Burman majority insisted that representation in both houses be based on population. In the same year, Buddhism was declared the official religion, a decision interpreted by Christian and Buddhist minorities alike as emblematic of Burman domination of the state.[29] Following the Ne Win coup of 1962, Burman chauvinists were unquestionably in charge. A new unitary constitution was promulgated by the military in 1974 and a nominally federal one with civilian participation in 2008.

[27] Brian Crozier, *The Rebels: A Study of Postwar Insurrections* (Boston: Beacon Press, 1962), pp. 85–89.

[28] Provided those groups had not been, historically, subjects of the Burmese king. The views of Karen observers at Panglong were ignored. Karens boycotted elections to the constituent assembly in 1947.

[29] For these events from the minority standpoint, see Lian H. Sakhong, "Democratic Movement towards Federal Union: The Role of UNLD in the Struggle for Democracy and Federalism in Burma," Chin Human Rights Organization, July 16, 2009, www.chro.ca. See generally Hugh Tinker, *The Union of Burma* (London: Oxford University Press, 1967).

After the first reforms of the military-backed regime in 2011, the same issues of federalism returned. The promises made at Panglong were recalled and formed an important part of the substructure of the claims of minorities to ethnic federalism.

By then, Burmans were officially consigned to governing seven regions and minorities to seven "states." Whereas the regime claimed that Burmans and minorities might, in a future constitution, enjoy equal representation in an upper house, minorities generally demanded that the Burman majority, as a single ethnic group, be confined to one state in an eight-state federal system.[30] In this battle of federal ideas, minorities, particularly those "frontier groups" whose superior position at Panglong was based on their never having submitted to the precolonial rule of the Burmese king, were generally wedded to a return to the Panglong Agreement, the high-water mark of their position in the country.

Since the military coup of 2021, these have become academic questions. Virtually all minorities have taken up arms against the military regime in continuation of the secessionist warfare that began three quarters of a century earlier because of the reneging of the first post-independence regime. Minority demands are heavily influenced by historical memory of an attractive commitment made and then abruptly withdrawn.

Indonesia's commitment problem is also, at least in part, traceable to an historical memory, this one, however, *aversive* rather than *attractive*. Indonesia's negative experience with a federal scheme, a United States of the Republic of Indonesia, contrived by the Dutch as they fought to retain their territory after World War II but seen by the nationalist movement as an attempt to divide it, thwarted any possibility of a federal dispensation after independence. So contaminated was such a project for Indonesian leaders that federalism could never again be placed on the political agenda, even after the fall of Soeharto more than a half-century later.

History helps shape the positions of the parties. Claims and responses are deeply affected by memory. Attractive memories feed aspirations about what is possible, necessary, and desirable, as they have in Myanmar. Aversive memories can put strict limits on what is feasible, even permissible, as they have in Indonesia. In both countries, as in others where protracted but unsuccessful negotiation has taken place, history has made mutually beneficial outcomes difficult to achieve. The entailments of history form links in Pierson's long causal chains.

[30] Here I am drawing on conversations in Yangon with both sides in October 2013 and on two subsequent occasions with minority representatives at other times and places.

In the 1950s, a series of revolts in Indonesia's Outer Islands gave rise to empty promises of regional autonomy, devolution laws that were repealed within a couple of years. Among these revolts was an insurrection in Aceh, whose provincial status had been revoked by Sukarno, then ostensibly but not genuinely reinstated in 1959. In the 1970s and 1980s, separatist sentiment grew in Aceh, and a Free Aceh Movement was organized to fight for independence. And fight it did. Only after Soeharto left office in 1998 was the war ended, and in 2001 Aceh was finally accorded its asymmetrical provincial autonomy,[31] which the central government has respected. It took many years of intensive warfare to break Indonesia's strong aversion to anything resembling provincial autonomy.

When devolution did finally arrive on the agenda after the first post-Soeharto elections in 1999, the few voices who favored federalism were quickly shouted down, and even the decision on regional autonomy, necessary as it was in a sprawling island nation, was made with a bit of ambivalence.[32] With the exceptions of Aceh and Papua, the preferred site of regional government was not the provincial level but, as mentioned above, the district and city levels beneath it, neither (as I said earlier) plausible arenas for future secession.

Aceh was treated differently after its rebels laid down their arms. Only in Aceh were local political parties allowed to be formed—and they were, after the dissolution of the insurgent organization, many of whose members went on to enter politics and rule the province. Their actions signaled the Acehnese rebels' commitment to the autonomy arrangements. Only in Aceh was the devolved government permitted to enact and enforce Islamic criminal punishments. Outside of Aceh, regional and ethnic political parties were prohibited, even at local levels, a dubious way to foster genuine regional autonomy. In Papua, the only other territory to receive autonomy at the provincial level, only candidates from nationally registered parties could contest regional elections, reflecting the distrust of the center of Papua's likely commitment to the arrangements. The upper house to represent all the devolved regions in the country, but which, oddly enough, was elected by provinces instead, was accorded very few, merely advisory powers. Considerable resources were conferred upon the regions, but recollection of the conflict with the Dutch and the later regional revolts had created a rather anomalous devolution configuration, very much affected by the fear of secession.

[31] Law no. 18 of 2001 on Special Autonomy for the Province of Nanggroe Aceh Darussalam. In Acehnese, Nanggroe means land. Darussalam means abode of peace.

[32] Horowitz, *Constitutional Change and Democracy in Indonesia*, pp. 124–42.

The course of devolution in Aceh and Papua could not have been more different. Aceh's civil war was ended by the extensive powers to be promised to the province, but warfare in Papua, genuinely secessionist and not as easily propitiated, did not end, and the post-Soeharto regime proved to be poorly committed to the promises it had made.

Papuans are mainly Christian Melanesians, many of whom have good reason to believe their territory had been transferred by the Netherlands to what they regard as a foreign state, by illegitimate methods involving a rigged sampling of Papuan opinion and under great pressure,[33] due to the explicit threat of Sukarno to use military force. Many migrants from elsewhere in Indonesia have settled in Papua, where they are likely to outnumber Papuans. The Indonesian military has also had a strong, and not always healthy, interest in the economic prospects of various extractive industries in Papua, the least developed territory in the country. An abiding sense of unequal treatment underlies the Papuan secessionist movement.

Among Indonesians, there was and is a strong perception that Papua is—and, among some, perhaps, that Papuans themselves are—backward and in need of a strong guiding hand from Jakarta.[34] After the fall of Soeharto, when the Indonesian armed forces, discredited by their use of violence against peaceful protesters, were politically weak, Indonesia missed an opportunity to create a new relationship with Papuans. Upon succeeding Soeharto, President Habibie was taken aback by Papuan demands for independence. He responded with repression.

Nevertheless, the special autonomy law was approved in 2001, during the presidency of Abdurrahman Wahid, widely known as Gus Dur.[35] Always solicitous of minorities, Gus Dur had rejected a draft by his Home Ministry, in favor of a more generous bill prepared by the Papuan provincial government.[36] The law provided broad autonomy, especially in resource management, with the return of 70 percent of oil and gas revenues and 80 percent of mining revenues to the province. It authorized creation of an upper house in Papua, exclusively to represent indigenous Papuans, in

[33] In the so-called Act of Free Choice described above.

[34] See Dave McRae, "A Discourse on Separatists," *Indonesia*, Vol. 74 (2002), pp. 37–58. For stereotypes about Papuans, see Isabelle Lucie Côté, "Unsettling Migrants: The Impact of Internal Migration on Sons of the Soil Conflict in China and Indonesia," Ph.D. dissertation, University of Toronto, 2014, p. 181.

[35] Law no. 21 of 2001 on Special Autonomy for Papua. Gus is a Javanese honorific connoting learning or refinement. Dur is a short form of Abdurrahman.

[36] Rod McGibbon, "Between Rights and Repression: The Politics of Special Autonomy in Papua," in Edward Aspinall and Greg Fealy, eds., *Local Power and Politics in Indonesia: Decentralisation and Democratisation* (Singapore: Institute of Southeast Asian Studies, 2003), pp. 194–233.

contrast to the lower house, apportioned by population and thus favoring the migrant population from elsewhere in Indonesia. The upper house, however, was only to have consultative and advisory functions. Furthermore, provincial authorities were to have no control over an aggressive military presence in the province and no redress for past human rights abuses. The law had no provision for any future referendum on the possibility of Papua's independence.[37] Despite these important omissions, Gus Dur's time in office constituted a brief period of liberality toward Papuan aspirations.

The implementation of Papua's autonomy was not carried out in good faith after the impeachment and removal of Gus Dur from the presidency later in 2001. Following Gus Dur's departure, a persistent desire of Indonesian governments to divide Papua, in order to provide precautions against secession by playing one part of the territory against another, asserted itself. Gus Dur's successor, Megawati Sukarnoputri, proved to be a dedicated centralist, hostile to Papuan aspirations. The Ministry of Internal Affairs opposed according any powers to the Papuan upper house, and Megawati delayed its establishment for four years, thereby enabling the lower house to proceed with only a minority of Papuan representatives. Then, contrary to legal commitments made, she divided the territory into two provinces, Papua and West Papua, a decision that made politicians in West Papua happy to acquire their newfound power. Surprisingly, the division survived a most unusual decision of the Constitutional Court holding Megawati's action to be unlawful but somehow irreversible.[38] As troops were being withdrawn from Aceh, they were augmented in Papua, and pro-Jakarta militias were organized there as well, making very clear the very different orientations of the central government to the two territories.[39]

Since that time, Papua has had a mostly low-level but determined insurgency, with independence its stated goal. In 2022, the Indonesian government divided Papua further, this time into a total of five provincial units. The central government appointed acting governors for the three new provinces instead of allowing their immediate election.[40] To be sure, the center enhanced the amount of revenue sent to Papua and created an assembly in each of the five provinces to protect Papuan rights. Still, the new design

[37] For a cogent examination, see Jacques Bertrand, "Indonesia: 'Special Autonomy' for Aceh and Papua," Forum of Federations Occasional Paper no. 31, Ottawa, 2019.

[38] Putusan Perkara Nomor 018/PUU-1/2003.

[39] For these events, see Horowitz, *Constitutional Change and Democracy in Indonesia*, pp. 139–41.

[40] For the inauguration of the three new governors, see: https://settcab.do.id/en/home-minister-inaugurates-three-new-provinces-in-papua, November 11, 2022.

facilitates central control,[41] since the five provinces, with their differing population composition, entertain varying degrees of support for the insurgents and especially since five new military commands were created to match the new provinces. Needless to say, the constant redesign has no parallel in the autonomy regime for Aceh.

Outgunned by a hostile Indonesian army and divided by clan and regional loyalties, Papuans nevertheless stepped up their violent resistance following the further division of the territory.[42] Among the best ways to feed secessionism is to delay, grant, and then scale back commitments to autonomy.

Impairments of devolution commitments are common unless a special-status territory that is to be accorded asymmetric powers is both remote and quiescent. So is reluctance even to abide at the outset by agreed and generally applicable devolution commitments. A recurrent pattern in Africa has been failure to implement promised devolution, or implementation in only a few areas, or implementation without losing much central government control. In several such instances, rebellions that were to be assuaged resumed. Only in a few cases have serious constitutional powers been devolved.[43]

The failure of the Sudanese government to implement regional autonomy and federalist schemes to which it was committed between 1972 and 1983,[44] and backsliding after further secessionist violence and another round of federal commitments in 2005, convinced southerners in each case to return to warfare. In 2005, the South was promised autonomy yet again, with the option for an independence referendum. Sudan is not alone. For example, the repeated failure to fulfill promises of autonomy over decades in Iraq led the Kurds in the North to seek independence whenever it was plausible to do so.[45] The Sudanese case is, however, a quintessential example of the way in which withdrawal of powers interacted with long delay to convince those adversely affected by regimes engaging in such practices that they must seek independence rather than regional autonomy. It took more than a half-century for the South to achieve secession in 2011.

[41] See Jefferson Ng and Cahyo Pamungkas, "Three New Provinces: Consolidating Central Control in Papua," Nanyang Technical University, Rajaratnam School of International Studies, Singapore, IDSS Paper no. 48/2022, August 26, 2022. The paper points out that the reorganization law may not be in conformity with the constitutional principles governing Papua's autonomy.

[42] See Armed Conflict and Event Data Project, "Papuan Independence and Disorder in Indonesia," October 5, 2022, acleddata.com.

[43] Hartmann, "Territorial Power Sharing and the Regulation of Conflict in Africa."

[44] Sudan had experienced civil war in the South from 1955 to 1972 and again from 1983 to 2005.

[45] See Gareth Stansfield, "From Civil War to Calculated Compromise: The Unification of the Kurdish Regional Government in Iraq," in Robert Lowe and Gareth Stansfield, eds., *The Kurdish Policy Imperative* (London: Royal Institute of International Affairs, 2010), pp. 130–44.

Conditions were hardly propitious for the integration of North and South Sudan at independence in 1956. British colonial policy had been to protect southerners from the influence of better-educated northerners. The result was a very backward, undeveloped South and strong sentiments of contempt for southerners on the part of their northern compatriots.[46] Fearful of their ability to compete, southern Sudanese, like northern Nigerians, had urged delay in granting independence. As the Sudanization of the civil service was being arranged in anticipation of the colonial departure, it turned out that southerners, a quarter of the country's population, were to receive only six of 800 civil service positions at independence. Their representation in the armed forces and police was equally anemic; and as British colonial officers departed the South, they were replaced by northern, Arabic-speaking civil servants ruling ethnic strangers for whom they had little sympathy. It did not take long for southerners to conclude that the northerners intended to colonize the South "for another hundred years."[47]

It took some time for the southern Sudan to fall into guerrilla warfare, but in 1963 southern troops mutinied upon hearing of orders that they were to be sent North to meet what they thought would be a very dangerous fate. During the mutiny, the soldiers killed northerners in large numbers and with great brutality, prompting equally brutal reprisals by northern troops and then the formation of a southern guerrilla army, the Anya Nya, that eventually controlled large swaths of the region.[48]

Only in 1972, after a military government under Ja'afar Muhammad Numayri had come to power and a single Anya Nya commander, Joseph Lagu, had finally taken charge of the southern movement, did the first phase of the fighting stop. Numayri and Lagu both wanted a settlement, and the president made a quite generous offer of regional autonomy, with an elected regional assembly holding a large measure of jurisdiction, an executive council responsible to the assembly, and the ability to request that national legislation inimical to southern interests be postponed or rendered inoperative. The army's presence in the South would only be authorized by the president in consultation with the southern executive. It did not take long for the agreement to be consummated.

Within little more than a decade, everything came undone. In spite of his generous instincts, Numayri could not refrain from interfering in southern

[46] Replete with pejorative expressions to characterize southerners.

[47] Quoted in Sudan Republic, *Report of the Commission of Inquiry into the Disturbances in the Southern Sudan During August, 1955* (Khartoum: Government of Sudan, 1956), p. 114.

[48] For a convenient overview of the 1955–72 period, see Cecil Eprile, "Sudan: The Long War," *Conflict Studies*, London, no. 21, March 1972.

affairs, beginning with the very first election for regional executive, an office for which he had a favorite candidate. In the early 1980s, Numayri began what he saw as a rationalization of government structures. There were to be five regions in the North and three in the South, the latter a divisive proposition among southern ethnic groups, which understood the reform to place southern regional governments on the same level as those in the North, rather than enjoying their former autonomy as a single unit. (Recall the similar territorial division, contrary to commitments, in Papua.) The largest southern ethnic group, the Dinka, saw the division of the South as an attempt to confine its influence to its home area.

Reflecting differences between Dinka and other southerners, a southern referendum on the plan passed narrowly, and then, in 1982, Numayri unilaterally imposed the division—an action resented in the South. The coup de grâce occurred in the following year, when Numayri, under pressure from Islamists in the North, imposed Shariah over the entire country. To the overwhelmingly non-Muslim South, which had long feared Islamization, this was a clear *casus belli*. Numayri had negotiated and agreed to a generous measure of autonomy and then essentially revoked it. The war resumed and continued for another 20 years.[49]

The southern cause was then led by a charismatic Dinka, John Garang, who made it his mission not to secede but rather to unify Sudan with a democratic dispensation. Following a stalemate in fighting, a new agreement in 2005 promised a government of national unity with certain power-sharing features, an expansive bill of rights, a separation of state and religion, proportional targets for southern government employment in the Sudan government services, southern autonomy, and—in the event national unity did not work out—a referendum on southern independence in 2011.

When Garang died in a helicopter crash a year after the agreement was signed, the idea of a single Sudan died with him. The armed southern movement did not trust the still-autocratic government in Khartoum, led as it was by yet another northern coup maker, Omar Hassan al-Bashir, and its distrust was fully warranted. The 2005 agreement was never really implemented. By 2007, neither side's having renounced armed struggle, there was renewed fighting between government forces and southern rebels, the former aided by a southern splinter militia based on intra-southern ethnic

[49] For a succinct statement of these developments from 1956 to 1983, see Mohammed Beshir Hamid, "Devolution and the Problems of National Integration in the Sudan," *Ethnic Studies Report* (Colombo), Vol. 2, no. 2 (1984), pp. 50–77. See also Ann Mosely Lesch, "Confrontation in the Southern Sudan," *Middle East Journal*, Vol. 40, no. 3 (1987), pp. 412–28.

divisions. Government forces had taken to bombing civilians in the South, with devastating effect.

Oil had been discovered in the upper South, and that meant that the North had reasons to dispute southern regional boundaries and to undermine the new dispensation. The elections promised in the 2005 agreement did not take place until 2010, and they were thoroughly rigged by the national government, which otherwise would almost surely have lost them. When the time came for the referendum, southern opinion voted nearly unanimously for independence.[50]

Soon after the 2005 agreement had been signed, the South had come to understand that the Sudanese government could not make credible commitments to a new regime. That government was thoroughly autocratic; it did not enjoy democratic support, and it dealt harshly with all opponents. Leaders in Khartoum had Islamist opposition, political party opposition, and abundant regional opposition in several parts of the country, and of course they had a military that had been fighting southern rebels for decades. Bashir had no commitment to the democratic methods that might have had a chance of keeping the South attached but would have risked the survival of his government. The fact that 98 percent of southern voters favored independence in the referendum, fully aware of the divisions among ethnic groups and militias that awaited them in an independent South Sudan, made it clear that after 56 years they had learned their lesson.[51]

When autonomy is finally negotiated for an ethnically differentiated region after a protracted conflict, both sides typically send out signals of seriousness, and there is usually some determination to believe that if the costs of conflict have been significant and good will has been manifested in negotiations, autonomy can be made to work. But if the political costs of autonomy then become obvious to the granting central government, its commitments can become fragile, as they did repeatedly in Sudan.

Withdrawal of autonomy is a powerful risk factor for secessionism. David S. Siroky and John Cuffie find that groups that have lost their autonomy are much more likely to pursue secession than are groups that possess autonomy

[50] Among many assessments of the failure of the 2005 agreement, see Khalid Mustafa Medani, "Strife and Secession in Sudan," *Journal of Democracy*, Vol. 22, no. 3 (2011), pp. 135–49; Marina Ottaway and Amr Hamzawy, "The Comprehensive Peace Agreement," Carnegie Endowment for International Peace, Washington, DC, January 4, 2011.

[51] For the next decade, fighting between the Dinka president and the Nuer vice-president and their respective armies wreaked havoc and cost an enormous number of lives as the two leaders and their ethnically based followings struggled for supremacy. The fighting was punctuated with peace agreements that did not hold.

or have never possessed it.[52] Yet attempts at secession do not always follow. It is not possible to account for all instances of withdrawn autonomy that nevertheless do not eventuate in secession. A few well-documented examples are helpful.

Among other variables, the composition of the formerly autonomous region affects the plausibility of separating it. Heterogeneity is generally a disincentive to secession. Vojvodina in Serbia, with its significant Hungarian population, lost its modest special powers but did not attempt secession.[53] Vojvodina has a Serb majority and a Hungarian minority of only 13 percent or so. While the Hungarians are mostly concentrated in the North, even northern cities do not have an exclusively Hungarian population. And Hungarians are not quite 3 percent of the total population of Serbia. By contrast, Albanians are a strong majority in Kosovo and regionally concentrated as well. They saw their persecution as an occasion for secession.

Lack of external support also discourages secession. An Anglophone region had joined Cameroon in an unbalanced bipolar federation after a favorable referendum vote in 1961 that involved the possibility of joining either Nigeria or Cameroon. The less populous and poorer Anglophone region was badly victimized by an authoritarian Cameroonian center, which dissolved the federation and declared a unitary state in 1972. Repression was begun against Anglophones who advocated restoration of the federal state, and in 1984 separatism began in earnest.[54] Conditions for its success were clearly lacking. Bordering a Nigeria that after the Biafra war had a severe aversion to separatism, the insurgents could count on no external support, even after a dispute between the two countries over a border demarcation. Once that was settled, Nigeria went back to a "neighborly" policy toward Cameroon.[55] It did not help that the Anglophone region had political party divisions and divisions between its northern and southern sectors. Repression and discrimination by the central government increased secessionist sentiment, but the armed movement controlled no territory. The insurgency ended in 1993 without even attaining regional autonomy.

After more than two decades, however, there was a revival of separatist violence. In 2019, in an effort to undercut the separatists, the Cameroonian government created regional assemblies for the two Anglophone regions,

[52] David S. Siroky and John Cuffe, "Lost Authority, Nationalism and Separatism," *Comparative Political Studies*, Vol. 48, no. 1 (2015), pp. 3–34.

[53] Tibor Purger, "Ethnic Autonomy: An Instrument for Minority Survival," paper presented at the Association for the Study of Nationalities Conference, Budapest, June 14, 2014.

[54] Andreas Mehler, "Why Federalism Did Not Lead to Secession in Cameroon," *Ethnopolitics*, Vol. 13, no. 1 (2014), pp. 48–66.

[55] Here I am drawing on a helpful email communication from Andreas Mehler, June 4, 2023.

Northwest and Southwest, with greater powers than the regional councils of the Francophone regions possessed. Dominated by pro-government appointees and governors with veto powers, the assemblies have not mollified the separatists, who fight on against renewed repression, with little chance of achieving their objectives.[56]

If secession is infeasible, claims for restoration of autonomy may still survive. As already discussed, the states of Sabah and Sarawak entered Malaysia in 1963 with devolved powers over language, migration to the states, revenue, land, religion, and citizenship.[57] The failure of the central government to honor many of those commitments has given rise to movements for restoration of full autonomy or, decades later, whispers about secession but no serious consideration of that possibility.[58] Whether or not formerly autonomous units actually embark on a secessionist course, leaders of many of them contemplate pursuing one.

It is worth looking at the Malaysian case more closely, because loss of autonomy has persisted without creating a secessionist movement. In 1945–46, the British, having returned after the Japanese occupation, had sought to merge the 11 states of peninsular Malaya in a new configuration called the Malayan Union. The autocratic methods employed in this project and the decline in the status of the Malay sultans and rajas it augured, among other features, aroused a powerful movement of Malay nationalism that eventually defeated the scheme,[59] resulting in a new federal arrangement in 1948. The creation of the new federation did not reflect any new enthusiasm among the population for state-level governance but rather a revulsion at the diktat in favor of the British-proposed Malayan Union, in which a very large minority of non-Malays had been intended to receive equal citizenship rights and the Malay rulers, important symbols of Malay priority in the polity, were to be downgraded.

The new colonial Federation of Malaya in 1948 eventually became the independent Federation of Malaya in 1957, in which the states were accorded very few important powers. By 1963, state-level loyalties were not moribund,

[56] For the assemblies, see International Crisis Group, "A Second Look at Cameroon's Anglophone Special Status," Briefing no. 188/Africa, March 31, 2023.

[57] For a concise view, see R. S. Milne, *Government and Politics in Malaysia* (Boston: Houghton Mifflin, 1967), pp. 49–74.

[58] See, e.g., "Sabah Legislature United on Full Autonomy," *Free Malaysia Today*, September 15, 2015.

[59] Mohamed Noordin Sopiee, *From Malayan Union to Singapore Separation: Political Unification in the Malaysia Region, 1945–65* (Kuala Lumpur: Penerbit Universiti Malaya, 1974), pp. 13–55. In 1945, the British had sent Sir Harold MacMichael to negotiate with the Malay rulers (sultans and rajas) in the Malay states, and they agreed to transfer authority to determine the future status of their territories to the British government. The reaction among the Malay population resulted in the abrogation of the British scheme and creation of the new Federation. See Means, *Malaysian Politics*, 1st ed., pp. 51–59.

but they were in retreat, and the elected rulers of independent Malaysia were more inclined to see the country whole, rather than as a federation of significantly distinctive states. A reflection of this durable inclination could be seen six decades later in a basic statistic. As Kai Ostwald has pointed out, "No federal country in the world expends a smaller proportion of public spending at the subnational level."[60]

When a British-initiated proposal came along to add Sabah and Sarawak, with their very different ethnic composition, to the federation, some second-tier Malay leaders had been opposed, and few at the top were sympathetic to the special commitments required to convince the ethnically differentiated populations of the two Borneo territories and Singapore to join the enlarged federation. These commitments were seen at the center as necessary to secure the accession of the two territories but not particularly desirable and, therefore, vulnerable to early erosion. In fact, so obvious was the disdain of those at the center for the powers of states that authorities in Sabah and Sarawak were not even consulted when Singapore was expelled from the new federation in 1965, although all three had joined at the same time as part of a package deal.

In retrospect, it is no surprise that the original commitments to the Borneo states were not kept and that chief ministers of those two states who did not conform to the expectations of leaders in Kuala Lumpur soon found themselves out of office. Reneging began early but persisted through several decades of rule, by a single coalition, the Barisan Nasional, until it lost the 2018 national election.

Promises of the new Pakatan Harapan government of 2018–20 to redress the problems of the two Borneo states had not been fulfilled by the time that government's popularity had waned. Discontent has persisted, and the cause of redress has been espoused by the elected leaders of the two states, who have consistently been aligned with whatever coalition gains power at the center. As the dispenser of numerous rewards and punishments, rulers of the central government have great power to limit dissent among Borneo politicians.

The reasons for the implausibility of a secessionist movement are multiple. Both states are ethnically heterogeneous, and some groups may lack enthusiasm for a secessionist project. Moreover, the demography of one of them, Sabah, has changed over the years, owing to illegal immigration of large numbers of Muslims from adjacent countries who owe their initial welcome and

[60] Kai Ostwald, "The Politics of Malapportionment and Electoral Reform in a Dominant Party Regime," in Helen Ting M. H. and Donald L. Horowitz, eds., *Electoral Reform and Democracy in Malaysia* (Copenhagen: NIAS Press, 2023), pp. 118–48, at p. 142.

continuing allegiance to the Malaysian government. The Philippines has had a dormant territorial claim on Sabah, based on an assertion of prior control by the Sultan of Sulu,[61] in a region now scheduled to enjoy autonomy in the Philippines, an autonomy that could produce a renewal of that claim.[62] Neither the Philippines nor Indonesia could be expected to be supportive of independence for Sabah and Sarawak. The strength and effective reach of the Malaysian government, the absence of neighbors supportive of secession, and the temptation of those neighbors to control any dissident states that might emerge all provide powerful reasons to abjure secession and hope instead for recompense from the Malaysian government for neglect of its obligations under the international agreement by which Sabah and Sarawak joined Malaysia.

The capacity of those on the receiving end of abandoned commitments to devolution can be heavily constrained. Vojvodina, Anglophone Cameroon, and the Borneo states of Malaysia all illustrate the constraints. Demography, geography, neighbors, and affinities of local politicians with the central government are among them. None of them, however, quells resentment at the withdrawal of commitment.

Long Delay and Lack of Fulfillment

If withdrawal of autonomy can produce secessionism, so do delays in meeting demands that could easily be satisfied by devolution.[63] The two frequently go hand in hand. As we have already seen in the case of Western Sahara, considerable passage of time, followed by autonomy concessions, provides no assurance that separatists will agree to incorporation of the territory they claim in the undivided state. In several cases, protracted periods of indecision—years or decades of negotiation, deliberation, stalemate, concession, and revocation, all without resolution—have served to convince separatists to attempt secession.

Beginning in the late 1950s, Sri Lankan Tamils suffered severe discrimination at the national level at the hands of successive Sinhalese-majority

[61] The Malaysian government pays a small annual rent to the Philippines in return for abandoning its territorial claim on Sabah.

[62] In 2013, an unofficial contingent of Filipino fighters landed from Sulu on Sabah to press the historical Philippine claim. They were ejected by the Malaysian army.

[63] The Casamance movement in Senegal, with its highly centralized regime, is a good example. See I. William Zartman, Hilary Thomas-Lake, and Arame Tall, "Senegal: The Limits of Hyper-Centralization," in Alan J. Kuperman, ed., *Constitutions and Conflict Management in Africa: Preventing Civil War through Institutional Design* (Philadelphia: University of Pennsylvania Press, 2015), pp. 135–57.

governments.[64] As discontent grew, so did negotiations for devolved arrangements. These negotiations took place sporadically over the course of nearly a half-century. They produced a long history of failed attempts to create Tamil-dominated councils with sufficient authority to avert separatism in the North and East of the island.

As early as 1957, district councils were incorporated in the Bandaranaike-Chelvanayakam Pact that was intended to assuage Tamil discontent with policies of the government of S. W. R. D. Bandaranaike, who had become prime minister after the election of the previous year. Sinhalese protest and Bandaranaike's assassination in 1959 rendered the B-C Pact a dead letter. Bandaranaike's widow and successor as prime minister, Sirimavo, revived the district councils idea in 1964, but her government lost power a year later, before the proposal could be implemented. The new government, led by the former opposition, had promised a similar devolution scheme in return for Tamil support in the 1965 national election. The proposal was withdrawn in 1968, when Sinhalese backbenchers of the ruling party, fearing for their seats, objected to it. This was the beginning of habitual alternating proposals and opposition to them by Sinhalese parties, depending on who happened to be in government and who in opposition could benefit from defeating proposals that might benefit the unpopular Tamil community.

In 1980, modest powers were finally conferred on district councils—as in Indonesia and Kenya, the level beneath the provinces—but this was shortly before the Tamil Tiger (LTTE) insurgency, which began in 1983 and which those few devolved powers were inadequate to avert. In 1985, the Sri Lankan government met a Tamil delegation for the so-called Thimpu Talks. The Tamil side issued a declaration demanding self-determination and a recognized homeland for the Tamils, but the government side refused to accept what it saw as a violation of Sri Lankan sovereignty, and the talks collapsed.

Before Indian troops intervened in the armed conflict in 1987, an accord between the Indian government, representing the Tamils, and the Sri Lankan government provided for a single provincial council covering the North and East, the areas of Tamil concentration. The arrangement was to be subject to a referendum in the ethnically heterogeneous East. The referendum, however, was never held. Sinhalese opposition parties simply rejected the agreement and made it difficult for a government facing elections to carry out the plan.

[64] W. Howard Wriggins, *Ceylon: Dilemmas of a New Nation* (Princeton: Princeton University Press, 1960); Neil De Votta, *Blowback: Linguistic Nationalism, Institutional Decay, and Ethnic Conflict in Sri Lanka* (Stanford: Stanford University Press, 2004).

Every government effort to devolve significant powers was thwarted by the fear that the Sinhalese opposition might profit by portraying the arrangements as dividing the Sinhalese patrimony. Instead, an amendment to the Sri Lankan constitution in 1987 provided a "veneer of devolution while retaining vast powers with the center."[65] The powers reserved to the central government seemed to withhold what had been granted,[66] and the devolution plan was rejected by the Tigers. Modest devolution to provincial governments did take place in 1990 pursuant to the amendment, but successive national governments recentralized some of the powers that had been granted, and a merger of the Northern and Eastern Provincial Councils into a single council, an important Tamil demand, was declared unconstitutional.[67] Here was a case of long delay, lack of fulfillment, and withdrawal of powers rolled into a bundle of reluctance.

An armed Tamil group competing with the Tamil Tigers, the Eelam People's Revolutionary Liberation Front (EPRLF), nevertheless had hoped to use the devolution scheme to keep Indian armed forces involved in the war, so that they would aid in creating an independent state, as they had in Bangladesh. Accordingly, one of the newly created councils, led by the EPRLF, asked immediately for additional power at the very moment when a new Sri Lankan president was facing both a Sinhalese nationalist insurgency in the South and serious interparty competition in forthcoming legislative elections. Sinhalese opinion was resolutely opposed to further concessions. This dispute gave an opening to the Tigers to resume warfare. For its part, the provincial council proceeded to declare its independence. Eventually, after the EPRLF lost a provincial election to an LTTE ally, a new ceasefire took hold, and Indian forces were induced to withdraw. Dayan Jayatilleka's judgment is incisive: By the time "the minimal conditions had been created on the ground for the setting up of the [council], the politico-psychological conditions necessary for its success had come and gone. It was the opposite of a premature birth; it was long overdue and when it arrived it was virtually—but not quite—stillborn."[68]

This was not the end of attempts to negotiate, but stillborn is the right word for those as well. Direct talks with the LTTE in 1989–90 and 1994–95

[65] Rohan Edrisinha, "Constitutions without Constitutionalism: A Tale of Three and a Half Constitutions," in Rohan Edrisinha and Asanga Welikala, eds., *Essays on Federalism in Sri Lanka* (Colombo: Centre for Policy Alternatives, n.d.), pp. 7–58, at p. 39.

[66] Neelan Tiruchelvam, "The Politics of Federalism and Diversity in Sri Lanka," in Ghai, ed., *Autonomy and Ethnicity*, pp. 197–218.

[67] See Ranjith Amarasinghe et al., *Twenty-Two Years of Devolution: An Evaluation of the Working of Provincial Councils in Sri Lanka* (Colombo: Institute of Constitutional Studies, 2010).

[68] Dayan Jayatilleka, "Devolution in Sri Lanka: The North-East Provincial Council, 1988–1990," *Ethnic Studies Report* (Colombo), Vol. 16, no. 2 (July 1998), pp. 160–96, at pp. 166–67.

went nowhere, and in each case the Tigers resumed their secessionist warfare. Further proposals in 1995–96 would have deleted constitutional provisions making Sri Lanka a unitary state. But no provisions were included for the representation of regional interests at the center—no senate or council of regions—and the center would have had the power to dissolve regional governments rather easily.[69]

A draft constitution of 1997 gave virtually no attention to Tamil claims, but still there were further negotiations. In 2002, the government of Sri Lanka and the Tigers agreed on principles of internal self-determination. Tamil areas were to receive special powers. The significant Muslim minority in the East did not participate in the negotiations, however. (Neglect of significant regional minorities and their interests in such negotiations is more common than one might imagine.) Even preliminary arrangements for the new structures proved difficult to implement. The Tigers put out interim self-governing proposals that accorded "plenary power" to the authority they would control, including power to appoint officials, such as electoral commissioners, power to interpret the agreement, and sole power to administer funds provided by the central government. These claims, together with a right to secede, proposed by the Tigers, made it clear that the LTTE did not contemplate shared rule with the Sri Lankan government in the North and East, and the negotiations collapsed months later.[70]

By the time the government was ready for a serious federal solution, the insurgents were ready only for secession. A conflict that could easily have been assuaged at the outset in the 1950s with a commitment to nondiscrimination,[71] and later with devolution, was allowed to ripen into a serious and protracted secessionist war. Lack of generosity at earlier stages had fueled grievance and rage. The negotiation game ended with the defeat of the Tigers in brutal warfare in 2009.

The Sri Lankan story shows the crucial risks of time inconsistency in devolution negotiations. For many decades, the Tamils, victims of discrimination since the late 1950s, had slowly been pushed out of the polity. Since the constitution of 1972, drafted by a Sinhalese government, which established Buddhism as the state religion, there had also been an official "entrenchment of majoritarianism."[72] As these events proceeded, the Tamils demanded

[69] Edrisinha, "Sri Lanka: Constitutions without Constitutionalism," pp. 46–48.

[70] Edrisinha and Welikala, "The Interim Self-Governing Authority Proposals," in Edrisinha and Welikala, eds., *Essays on Federalism in Sri Lanka*, pp. 292–308.

[71] Demands for federalism did not attract widespread support among the Tamils until the mid-1950s, particularly after the election of a government headed by S. W. R. D. Bandaranaike in 1956, when Sinhalese exclusivism and discrimination became major problems.

[72] Edrisinha, "Constitutions without Constitutionalism," p. 8.

substantial devolution, then federalism, then independence. The central government uniformly responded with less, never conceding a federal state.[73] The Tamils were not provoked to secession by any capacity conferred by regional institutions, which they did not have until the Tigers captured territory—and then the Tigers were brutal authoritarians—but by the persistent lack of equality in all Sri Lankan institutions. Sri Lankan governments were highly constrained by Sinhalese opposition parties and violent organizations in the Sinhalese South, so the concessions they were able to make were either reversed due to Sinhalese opinion or rejected as inadequate by the Tigers.

Initially, Sri Lankan governments feared that any liberality would result in their being turned out of office. With each such failure, the Tigers became more inclined to secession, at which point neither side had credibility with the other side.

In 2015, six years after the Tamil Tigers were defeated by the Sri Lankan army, the ethnic-chauvinist autocrat Mahinda Rajapaksa lost a presidential election to an interparty coalition candidate, a Sinhalese supported heavily by Tamil and Muslim minorities. With secession off the agenda and a fresh start, it seemed possible to think anew about devolution, and a serious attempt to put a new constitution in place began. Devolution was very much on the agenda of the constitution drafters, and a surprising degree of interethnic consensus on devolution and other matters appeared in the Steering Committee of the constitution drafting body.

Unfortunately, the work took so long that the proposals bumped up against impending elections. In those elections, Rajapaksa seemed likely to return to power—and ultimately did, as prime minister, with his brother as president—weakening resolve on the Sinhalese side about the feasibility of concessions that would again make proponents electorally vulnerable and ending the most promising effort at conflict reduction since independence.[74] Serious commitments to devolution over many decades have either been withdrawn or never quite come to fruition. Distrust was abundant on both sides, and just when distrust had truly begun to erode after 2015, the project ran out of time.

The Philippines has also had a five-decades-long conflict over autonomy for Muslim ("Moro") areas of the South, principally stimulated by conflict between post-World War II Christian settlers and Muslim communities

[73] Ibid., p. 39.

[74] The course of the Sri Lankan constitutional process of 2015–18 and its failure is traced in Horowitz, *Constitutional Processes and Democratic Commitment*, pp. 153–207. The Rajapaksas were compelled to resign in 2022 following massive crowd protests over their economic mismanagement.

on the southern island of Mindanao. In the Tripoli Agreement of 1976, autonomy was to be accorded to 13 provinces and 9 cities comprising the "Bangsamoro Homeland." The Philippine government submitted the proposals to a referendum, as a result of which only 10 provinces were to be included. After the government set up two autonomous regions, Moro rebels declined to participate, and violence continued. When further negotiations collapsed in 1987, the government, again unilaterally, established a Consultative Commission of 28 Christians and 16 Muslims, which held contentious discussions. After another plebiscite, four regions joined the autonomy scheme, but again the rebels opted out. These were just the beginnings of a string of failures.

Two decades after the Tripoli Agreement, a supposedly "Final Peace Agreement" gave rise to an Autonomous Region of Muslim Mindanao in 1996. The Philippine Congress, however, distanced itself from the autonomy arrangements, and the executive order setting up the region provided no funds for the transition and insufficient revenue to maintain autonomous institutions.

The Moro National Liberation Front (MNLF), which had fought to establish the region, proved incapable of administering it in the transitional period that had been established, and the rival Moro Islamic Liberation Front (MILF) declined to participate in negotiations to establish it. On the government side, legislative support was lacking for an agreement negotiated by the president, and a change in the executive saw an end to support for it in that branch as well. A plebiscite conducted to determine the boundaries of the region aroused the opposition of Mindanao Christians, who voted to keep their territories out of the region. With the government's default on its promises for the region and the MILF's resumption of violence, the agreement died in its infancy.

A recurring theme over the decades in relations between the Philippine government and the Moro rebels was the variable enthusiasm of Filipino presidents and legislatures for devolution. Presidents can only serve one six-year term, and by the time they manage to negotiate an agreement that promises a measure of autonomy, they are typically at or near the end of their term. The matter is then left either to an unenthusiastic Congress, which rejects the agreement or fails to fulfill commitments made under it, or to an incoming president with a different perspective, whose interest in implementation may be lukewarm. This kind of slow dance accounted for much wasted time from 1986 to 2018, and it amounted to the functional equivalent of dishonored commitments.[75]

[75] See Jacques Bertrand, *Democracy and Nationalism in Southeast Asia: From Secessionist Mobilization to Conflict Resolution* (Cambridge: Cambridge University Press, 2021), pp. 141–74. For examples of the role of the Philippine Congress in reneging on government commitments, see Eric Guttierez, "The Politics

One consequence of recurrently unreliable commitments was the growth of multiple secessionist movements, ethnically or ideologically differentiated, among the Moros. Despite its pan-Islamic aspirations, the MILF, which broke away from the MNLF, was strongest among the Maguindanao ethnic group on the island of Mindanao. The MNLF was strongest among the Tausug ethnic group on the island of Jolo. The Abu Sayyaf organization, which had strong ties to regional and Middle Eastern Islamic terrorist organizations, was more influential elsewhere in the Sulu archipelago. Failure of the government to keep commitments provided ample opportunity for multiple rebel groups to compete in denouncing each other's approaches.

It proved difficult for the Philippine government to deal with more than one rebel group at a time. In the early years of devolution negotiations, the MNLF was the exclusive interlocutor, but later it was replaced by the MILF. Still, there were obstacles. Nearly a decade after the failure of the 1996 agreement, the Philippine government decided to accede to the MILF's demand for an enhanced form of devolution, but the Philippine Supreme Court questioned its constitutionality. After nearly another decade of stop-start bargaining, during which Abu Sayyaf joined in attacks that periodically helped to scuttle the negotiations, the government of Rodrigo Duterte in 2018 managed to secure legislative support for an agreement with MILF to establish a Bangsamoro Autonomous Region in Muslim Mindanao (BARMM).

The new arrangements were very different from those agreed with the MNLF in 1996. They provided expanded powers and the possibility of expanded territory for the region. The legislature's agreement was subject to a plebiscite allowing particular areas to decide whether to accede to the new region or to stay outside its jurisdiction, an important proviso because Moro organizations habitually claimed territory with large Christian populations over which they might rule.[76] In the 2019 plebiscite, some territories did accede but others (mainly noncontiguous ones) did not.[77] Tausug voters in Sulu Province voted to stay out of the new region, dominated as it is by Maguindanao of the MILF.

The Covid-19 pandemic made administrative progress in launching the new regional government very difficult to achieve. This problem was compounded by the need for the MILF, which negotiated the agreement, to compete with other parties in a free election for consent to run the new region.[78]

of Transition," *Accord* (London), no. 6 (1999), pp. 66–73. For an overview of the disjointed devolution process in Mindanao, see Wolff, Ross, and Wee, *Subnational Governance and Conflict*, pp. 40–44.

[76] A prospect conducive to a continuation of earlier warfare between the two populations and their respective paramilitaries.

[77] See Michael Hart, "With Autonomy in the Southern Philippines, Muslim Rebels Must Learn How to Govern," *World Politics Review*, February 12, 2019.

[78] See Armi Beatriz E. Bayot, "Democracy on Hold? Framing the Debate on the BARMM Transition in the Philippines," www.iconnectblog.com, February 10, 2021.

A year and a half before the date of that election, scheduled for May 2022, the Philippine government and the MILF proposed a three-year extension of the duration of the transitional period and a corresponding postponement of the election deadline, citing a lack of progress in implementation of the autonomy arrangements. In the southern Philippines, postponements are a way of life, which is not wholly surprising given the complex ethnic conflicts of the region, including those among Moro groups.[79]

As in the other cases, then, key groups and organizations were, from time to time, excluded from the negotiations. Not only were several Moro rebel organizations absent at any one time, but so was the New People's Army that had taken hold among Christians in the South, as well as the Lumud (or Lumad) communities indigenous to the region and certain to be affected by whatever arrangements were to be agreed.[80] Occasionally, even representatives of the large Christian population of Mindanao were excluded.[81] Repeatedly, failed agreements gave way to new fighting, until a new agreement was signed that proved insufficient to end the warfare. In 2018, however, the MILF committed itself to use force against militants who might otherwise act as spoilers. Long delay had proliferated armed separatist organizations.[82]

One feature that stands out from the nearly half-century of hostilities in the Philippines is that the end-state of the separatist violence was, in later years, conceived to be regional autonomy, not secession. In spite of rhetoric about independence, Moro rebels were prepared to negotiate autonomy, although the powers demanded for the autonomous unit were so enlarged over the decades that the sides were, for long periods, unable to finalize a deal. The armed Moro organizations were doubly unlucky in not having the continuing support of an adjacent state that was willing to abet a genuinely secessionist rebellion.[83] As already noted, the Moros also share significant parts of the territory with heavily armed Christian populations and anti-Moro militias

[79] In addition to its ethnic and subethnic heterogeneity, the region is suffused with serious clan conflicts that can affect elections. See International Crisis Group, "Southern Philippines: Tackling Clan Politics in the Bangsamoro," Report no. 306/Asia, Brussels, April 14, 2020.

[80] For neglect of the interests of the Lumud minority, see "Lumuds and the Peace Process: Interview with Ramon Moambing," *Accord* (London), no. 6 (1999), p. 65.

[81] Carmen A. Abubakar, "Review of the Mindanao Peace Process," *Inter-Asia Culture Studies*, Vol. 5, no. 3 (November 2004), pp. 450–64; Conciliation Resources, "Compromising on Autonomy: Mindanao in Transition," *Accord*, London, April 1999.

[82] And for that reason, dangerous armed episodes continued to occur. See, e.g., Michael Hart, "The Philippines' Bangsamoro Peace Process Is Not Yet Complete," *World Politics Review*, August 25, 2023.

[83] In the 1970s, the Moro movement had support for a time from Muammar Gaddafi's Libya and briefly from the proximate Malaysian state of Sabah during the chief ministership of Tun Mustapha Harun, whose origins were from ethnic groups in the Sulu archipelago. When his chief ministership was ended in 1975 by the Malaysian prime minister, Sabah ceased its support.

that previously fought them.[84] Had it not been for these exceptional circumstances, secession would almost surely have been the objective, particularly because they could look back to a colonial history in which neither Spaniards nor Americans had fully subdued them.

The Price of Delay

Notice the important part played by the extraordinary delay in both Sri Lanka and the Philippines. Early devolution, while the advantages are obvious and grievances are not fully developed, can prevent the emergence of conflict.[85] Yet post-conflict devolution is much more likely. Political leaders of states that could benefit from federalism or regional autonomy typically come to that realization too late. Their reluctance to devolve power often increases as conflict grows, because their fear of secession also increases, as does the opposition of their clientele to concessions. Then, when warfare threatens or becomes acute, a semi-partitionist federalism, of the sort characteristic of Bosnia's Dayton Accords and recurrent proposals for reuniting Cyprus, with a very weak center, can become more likely. If this happens, the new arrangements may barely hold the overarching state together and do nothing to counter its frailty. On the other hand, even somewhat late devolution, implemented with seriousness before full-blown crisis sets in, might still enjoy success in conflict mitigation. Timing is critically important, but late devolution typically signals reluctant or reversible devolution.

As we have seen, opportunities are missed to reduce discontent and the separatist sentiment that sometimes follows, and they are missed for numerous reasons. Prominent among these reasons is delay resulting from majority distaste for surrendering full authority over the region. Lack of generosity is another, especially if it signals lack of genuineness. With the two asymmetric exceptions of Aceh and Papua, Indonesia was able to consummate a general devolution to hundreds of regions because the move followed immediately upon a regime change. Because it was general, the Indonesian regional autonomy plan encountered no initial resistance based on opposition to a single unpopular minority. By contrast, the Sri Lankan and Filipino governments

[84] Fighting between organized Christian and Muslim gangs in Mindanao went back to the 1960s and 1970s.

[85] Cederman et al., "Territorial Autonomy in the Shadow of Conflict," pp. 354–70, find that early (pre-conflict) measures of devolution are likely to constitute effective prophylaxis.

were unable to devolve generous power at a sufficiently early stage to forestall serious armed separatism by what were and had become increasingly unpopular minorities.

In Sri Lanka and the Philippines, as we have observed, repeated failures of negotiation produced escalated demands, backed by force, which generated heightened resistance to them.[86] Obviously, it was neither federalism nor devolution, both non-existent, that gave Tamils or Moros the inclination or capacity to fight. Delay strengthened the hands of the insurgents and caused them to increase their demands and, especially in the Philippines, proliferated armed groups fighting the central government. Following serious conflict, resistance of the central government to a significant devolution convinced even formerly moderate members of the separatist groups of the need to use force, which heightened distrust on the part of the central government and resistance on the part of its opposition elements, reinforcing their reluctance to make critical decisions. This reluctance moved the separatists to greater ambition, just as it did in Papua. The behavior of each side persuaded the other of the danger of agreement. Failed negotiations are far from harmless.[87]

In both cases, the reluctance of the central governments reflected the antipathy of majority populations to the minorities. That antipathy strengthened armed movements opposing the separatists, the Janatha Vimukthi Peramuna (JVP) in the Sinhalese South of Sri Lanka and Christian militias in Mindanao in the Philippines. Negotiations were also complicated by conflicting demands of multiple armed separatist organizations in both countries, some of which the central governments thought could be used against the others. And in each case, critical ethnic groups or organizations were often left out of negotiations. Finally, in both the Sri Lankan East and the Filipino South, depending on what was agreed, power conferred on separatist groups could have left them in control of non-separatist regional minorities—and in parts of the Philippine South, even of regional majorities—Muslims and Sinhalese in the East of Sri Lanka, Christians and Lumuds in the Philippines,[88] groups that, as we have observed, were also often left unconsulted. The

[86] The same is true of reluctant implementation of agreed devolution, which typically produces more radical demands. See, e.g., Dawn Walsh, *Self-Government as a Conflict Management Tool* (Basingstoke: Palgrave Macmillan, 2018), p. 154, on Moldova.

[87] For additional unanticipated consequences of failed negotiations, see Donald L. Horowitz, "Eating Leftovers: Making Peace from Scraps off the Negotiating Table," in Günther Baechler and Andreas Wenger, eds., *Conflict and Cooperation* (Zurich: Neue Zürcher Zeitung Pub., 2002), pp. 293–309.

[88] See R. J. May, "The Moro Conflict and the Philippine Experience with Muslim Autonomy," unpublished paper prepared for the CCPCSAP Workshop, Canberra, September 2002; Nathan Gilbert Quimpo, "Options in the Pursuit of a Just, Comprehensive, and Stable Peace in the Southern Philippines," *Asian Survey*, Vol. 41, no. 2 (April 2001), pp. 271–89.

demands of such groups might have thwarted any serious devolution unless separatists agreed to further (subregional) devolution or opt-out clauses for specific localities, which finally were implemented in the Filipino plebiscites.

Although Sri Lankan Tamil separatists were defeated after a quarter-century of war, and Moro separatists may finally establish a territory to be administered, the recurrent failures of negotiations served no useful purpose. What would have been manageable at the outset became unmanageable in the face of multi-sided distrust and wartime hatred later. In every way, delays fed warfare rather than accommodation.[89]

Some of the delay in considering devolution in unitary states results from serious apprehension that special arrangements threaten the core tenets of the unitary political order.[90] In most cases, however, the armed conflict alternates with ceasefires and negotiations that occasionally may produce modest concessions toward "decentralization" that are generally not followed up and so result in a resumption of hostilities.[91] Many other examples of the same kind of drift could be cited. Most unitary states will avoid a decisive commitment to devolution, not to mention federalism, for as long as possible. In doing so, they are willing to accept modest and, in some cases, more than modest casualties from armed conflict over many years, if the insurgency is located in peripheral areas, especially if the insurgents are not actively supported by a foreign government. Moros in the Philippines have been exceptional in their ability to reach an agreement after so many delays, but of course its final configuration and implementation are both problematic.

Commitments and Defaults

Devolution is not a particularly popular institutional choice among central government leaders in most countries. After all, devolution involves surrendering certain government prerogatives, to the disadvantage of those leaders. Federalism would need to be embedded in the constitution and

[89] Compare the prompt settlement of the Albanian violence in Macedonia, with its rather generous concessions. See Risto Karajkov, "Macedonia's 2001 Ethnic War: Offsetting Conflict," *Conflict, Security and Development*, Vol. 8, no. 4 (December 2008), pp. 451–90.

[90] For a well-informed discussion of these obstacles, including even those of vocabulary, pertaining to the half-century rebellion of Malay Muslims in southern provinces of Thailand, where the unitary state is tightly bonded with the history and stability of the monarchy, see Duncan McCargo, "Autonomy for Southern Thailand: Thinking the Unthinkable," *Pacific Affairs*, Vol. 83, no. 2 (2010), pp. 261–81.

[91] See, e.g., Senegal's long-running insurgency in Casamance in the South. Zartman, Thomas-Lake, and Tall, "Senegal: The Limits of Hyper-Centralization," in Kuperman, ed., *Constitutions and Conflict Management in Africa*, pp. 135–57; and Bangladesh's long-running, off-and-on insurgency in the Chittagong Hills. SMS al Sajib et al., "Contested Peace: The Chittagong Hill Tracts Peace Accord," *Social Change*, Vol. 48, no. 2 (2018), pp. 260–74.

seems unusually permanent and therefore is even less popular with central leaders than the generally more revocable regional autonomy is. We have already discussed the general obstacles to devolving power to political opponents, unpopular minorities, and separatists who may be inclined to move on from devolution to pursue secession.[92] Nonetheless, central governments are sometimes obliged to devolve power, perhaps because of actions they themselves or their predecessors have taken. Obliged or not, they may be reluctant to act, or they commit themselves while hoping that the commitment need not be fulfilled or commit themselves only to encounter a backlash among their supporters or opponents, or unforeseen and undesirable effects within the devolved units. What seems clear is that the groups upon which power is devolved want to see the devolution decision, usually embodied in law, as a hard commitment, whereas what we have witnessed in this chapter—lack of fulfillment, long delay in negotiation or implementation, revocation in whole or in part—makes abundantly clear that the commitment often proves to be much softer than desired by the beneficiary groups.

That fact alone might be unremarkable, since many political commitments, collective or individual, are subject to being regretted, forgotten, or dishonored. Most often the balance of adverse consequences of vacillation or revocation falls upon the spurned beneficiary of the commitment. In the case of separatism, however, because equivocation fosters distrust, it can have very serious costs for the government that debases or revokes the commitment, costs in terms of persistent discontent, protest, or secessionist warfare. That is the meaning of labeling them risk factors, and we have seen, in the dozen cases we have just reviewed, that prolonged or renewed warfare commonly—not always, but very commonly—is a consequence of negotiating but failing to reach firm devolution commitments or reneging on those that have been made. And the costs in the reputation of the reneging party, a problem of credibility in subsequent negotiations, most crucially to restore peace, can also be serious.

How to explain the propensity for central governments to engage in going slowly on devolution or backtracking on it when that behavior can be so costly? The literature on investment under uncertainty proves to be quite pertinent.[93] A brief excursus into that literature can help us understand various forms of difficulties in devolution.

[92] This last reason for reluctance of central decision-makers may be motivated by misperception, an exaggerated sense of the probability of a secessionist outcome.

[93] Beginning with the book of that title by Avinash K. Dixit and Robert S. Pindyck, *Investment under Uncertainty* (Princeton: Princeton University Press, 1994).

Starting from the premise that forecasts of returns can be excessively optimistic and the opportunity costs of investing can be very high, it may be preferable to wait or to invest gradually, so as to reap the rewards of optionality. This approach was quickly considered as an alternative to the "big bang" economic reforms of the early post-communist period in certain Eastern European countries, particularly Poland.[94] Soon it was being applied to a range of government policies, in which the option to wait might add value to a decision; the more uncertainty, the greater the value. Because the costs of changing policies can be significant, waiting can optimize returns.[95]

Some of the most careful calculations were performed to explain why it might be preferable for Switzerland to delay joining the EU, even though joining earlier would probably create a net benefit. Entry is costly because it involves adopting a large number of EU laws and policies,[96] and the costs are sunk. In practice, the decision to join is essentially irreversible, but the future cost–benefit ratio is uncertain, and the decision can be postponed. With sunk adjustment costs and an uncertain level of positive payoffs, immediate action may not be optimal. The more uncertain the benefits, the greater the value of waiting.[97]

Now return to devolution, which involves institutional changes and rather high start-up costs, many of which are sunk. In Indonesia, for example, more than two million civil servants from various ministries were rapidly transferred to the newly devolved districts and municipalities.[98] Overall, the benefits may be significant in assuaging ethno-regional resentments, but in certain cases, especially after conflict has occurred, their achievement can be problematic. Moreover, devolution may reduce governmental performance, depending on the ability of devolved units to meet uniform standards of performance, and it may create conflicts within and among devolved units over resources and other matters. In short, devolution is a policy seen to entail uncertain costs and uncertain benefits, even apart from its impact on separatism. The range of potential costs is wide, and some may be very high. Devolution is usually an investment under uncertainty.

To be sure, bad faith on the part of central governments cannot be excluded in some cases as a motive for long delay, partial fulfillment, and withdrawal.

[94] Mathias Dwartripont and Gerard Roland, "The Design of Reform Packages under Uncertainty," *American Economic Review*, Vol. 85, no. 5 (1995), pp. 1207–23.

[95] Joseph G. Haubrich and Joseph A. Ritter, "Committing and Reneging: A Dynamic Model of Policy Regimes," *International Review of Economics and Finance*, Vol. 13, no. 1 (2004), pp. 1–18.

[96] Embodied in the *acquis communautaire*, 100,000 pages of laws and policies.

[97] Beat Spirig and Rolf Weder, "To Wait or Not to Wait: Swiss EU Membership as an Investment under Uncertainty," *Swiss Journal of Economics and Statistics*, Vol. 144, no. 1 (2008), pp. 85–114. At this writing, Switzerland is not a full member of the EU.

[98] This excludes the asymmetrical cases of Aceh and Papua.

Some governments may simply be playing for time, and so they concede autonomy when they are relatively weak or when conflict has occurred, implement it in part or delay implementation, and then do no more or retract what they have granted once the situation becomes more propitious for them.[99]

Although that may be the motive in some cases, genuine uncertainty is surely the motive for delay and backtracking in others. Uncertainty might appear to counsel waiting or investing in stages. Why not delay the commitment or fulfill it modestly, avoiding the highest costs or those most difficult to recoup, and if the benefits do not appear, then avoid further costs or even reverse course? After all, many separatist movements are internally divided between those who are likely to be satisfied with devolution short of secession and those who may not be. If the central government is unable to forecast the relative strength of these factions, the absence of foresight counsels temporizing.

Similarly, as we have seen most acutely in Sri Lanka, the central government's apparent willingness to devolve even a modicum of power can provoke opposition in its own ranks or in the ranks of ethnic opponents of the separatist group in other political parties that can bring down the government. "From this perspective, what looks like unwillingness on the part of political elites is in many cases a limit of their political capacity to make concessions to adversaries that their constituencies, in particular hard liners, do not support,"[100] because they represent minorities who are unpopular or viewed as dangerous.

Either form of opposition may produce great caution in willingness to devolve, in the scope of what is devolved, or in the reversibility of what has been devolved. Under these uncertain circumstances, a full and irreversible government commitment to devolution could prove unattractive.

If the willingness of the separatists to accept autonomy and to prevail over those in their ranks who demand independence can be demonstrated in advance, caution in the central government could be dissipated,[101] but in the disorderly environment of violence that typically precedes devolution decisions, it may be very difficult or impossible for separatists to demonstrate that willingness. Likewise, it may be impossible in advance to verify the inclination of opponents on the central government side to forswear

[99] Russia's behavior toward Tatarstan, and the behavior of some former Soviet states in Central Asia toward minority regions, suggest these possibilities.

[100] Wolff, Ross, and Wee, "Subnational Governance and Conflict," p. 73.

[101] For a similar signaling dilemma in an electoral context, see Stathis N. Kalyvas, "Commitment Problems in Emerging Democracies: The Case of Religious Parties," *Comparative Politics*, Vol. 32, no. 4 (2000), pp. 379–98.

their opposition to devolution until public reaction to the proposal becomes apparent. This would explain the very behavior we have witnessed, and there is little doubt that an assessment of investment under uncertainty can account for governmental behavior in many cases.

The problem is that the assessment can be wrong about a single decisive component: the costs of waiting. Devolution, especially when it entails ending a conflict, requires commitment, and the beneficiaries are constantly judging credibility. Incrementalism creates doubt among the intended beneficiaries of devolution. Commitments whose credibility is undermined, willfully or otherwise, by those who have made them can produce the very behavior they were designed to avert. That is, if the apprehensions of central government leaders about secessionism cause them to go slowly or to renege on devolution, that can produce further armed activity by secessionists, which can reinforce the government's apprehensions and confirm the decision to renege, thereby solidifying the armed response of the separatists.

This could be a form of miscalculation by central governments that may also weigh the benefits of delay highly, because they are salient in the present. Those benefits include the potential ability to neutralize opposition to devolution of ethnic groups or political parties well represented on the central government side. Those groups or parties may oppose concessions, especially asymmetrical ones, to disaffected minorities and wish to eliminate demonstration effects for other separatists, or they may simply need to propitiate their own proponents of unitary government. If the central government's survival in power is put at stake by an unpopular decision to devolve power, it may renege on devolution even if it apprehends the costs in terms of renewed warfare accurately.

These calculations are not always wrong, of course. Sometimes central governments that weigh current benefits of reneging highly, future benefits of devolving power skeptically, and future costs of reneging modestly do not incur the most serious costs. But when these calculations are wrong, they can be egregiously wrong. They can result in years and years of conflict, proliferating rebel groups, and decades of warfare—even, in the most tragic cases, multiple decades. Those who value the benefits of delay need always to contemplate carefully the potential costs, which not all do.

Thomas C. Schelling, who pioneered the study of commitment, points out how difficult it is to persuade counterparties of the genuineness of commitments in the face of distrust. Virtually all the techniques he identifies to induce reliance of the other party require substantial measures of self-abnegation:

forgoing opportunities, impairing one's own position, accepting the willingness to be sued or subject to other forms of third-party enforcement.[102] Governments find it "difficult to commit themselves. Periodic free elections make pledges transient …."[103]

Several studies suggest the utility of adding power-sharing arrangements at the central government level.[104] But where commitment is already shaky, and vacillation and incremental approval reflect genuine apprehension of governments about whether devolution is the right and safe course or whether its beneficiaries will be content with devolved authority, an even firmer commitment at the central government level will not be seen to be an attractive addition.

These considerations make it obvious that delays and reversals in the process of devolution will be treated by distrustful separatists as outright reneging or even as provocations, the more so if, as ethnic strangers, they have experienced especially hostile treatment that enhanced distrust before or as their claims matured.[105] It is no surprise that long delay, lack of implementation, and revocation are seen as failures that produce an attempt to secede whenever that course is plausible and often even when it is not. In fact, in countries exhibiting any of the risk factors enumerated in this chapter, it would be difficult or impossible to convince secessionists or autonomists that commitments to devolution would be observed.[106]

[102] Thomas C. Schelling, *Strategies of Commitment and Other Essays* (Cambridge: Harvard University Press, 2006), pp. 1–24, 107–11; Schelling, *The Strategy of Conflict* (Cambridge: Harvard University Press, 1960), pp. 43, 44.

[103] Schelling, *Strategies of Commitment*, p. 16. By contrast, it is easy for governments to acquire a reputation for firmness in refusing to accede to demands for devolution in countries with multiple groups that might make such claims, but this reputation is based on consistency, not inconsistency, or delay in deciding, or retracting commitments. See Barbara Walter, "Building Reputation: Why Governments Fight Some Separatists but Not Others," *American Journal of Political Science*, Vol. 50, no. 2 (2006), pp. 313–30. For the rewards of reputations for honoring commitments and the dangers of dishonoring them, see Douglas Gibler, "The Costs of Reneging: Reputation and Alliance Formation," *Journal of Conflict Resolution*, Vol. 52, no. 3 (2008), pp. 426–54.

[104] For example, Lars-Erik Cederman et al., "Territorial Autonomy in the Shadow of Conflict: Too Little, Too Late?"; Katherine Adeney, *Federalism and Ethnic Conflict Regulation in India and Pakistan* (New York: Palgrave Macmillan, 2007), pp. 161–62; Stefan Wolff, "Complex Power-Sharing and the Centrality of Territorial Self-Governance in Contemporary Conflict Settlements," *Ethnopolitics*, Vol. 8, no. 1 (2009), pp. 27–45.

[105] For some of these, see Kirschner, "Knowing Your Enemy," pointing out some experiences that exacerbate distrust in commitments by governments in ethnic war.

[106] This is obvious in the cases of illegitimate incorporation and changing balances of power. Inapt configurations might be more ambiguous, because Slovaks, for example, had an effective veto, but their leaders nevertheless chose separation.

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PART III

DEVOLVED UNITS

Where Politics Meets Law

5
Dysfunctions

The Devils in Devolution

States that have engaged in serious devolution projects typically encounter several dysfunctions, or perhaps they should be called pathologies. Very often ethnic minorities are encapsulated within units dominated by intolerant majorities, who are determined to control the unit. A regional majority may even have demanded the new unit for the very purpose of subjugating a regional minority. Sometimes an inadequately conceived design inadvertently creates incentives for ethnic violence. With a new unit may come claims to a homeland for a certain group in that unit, whether devolution to homelands is intended or not. Other groups located there may find themselves disadvantaged. Either local or national rules regarding indigenousness can produce seriously discriminatory practices when they are enforced in the new subnational setting.

Similarly, authoritarian compartments, with "oligarchic families, tame media outlets, captured courts, and municipal government machines,"[1] all possible in unitary regimes, become more insulated from central control when regional authorities have their own delegated powers. Autonomy can facilitate actions in excess of devolved authority that may be hard for the center to detect and check. Local elections are harder to oversee when there are dozens of units in small- or medium-sized states or hundreds in large ones.[2]

If central governments come to regret earlier devolution decisions and opt to renege by taking back powers that had been granted or by simply failing to observe earlier commitments, they may become not merely centralized but excessively so. And, unless devolved units are long established, the advantages of controlling a new unit or a resource located in one part of a unit can produce demands to divide the unit or create a new unit, leading to seemingly endless proliferation of devolved units, each duplicating the facilities of

[1] Jacqueline Behrend and Laurence Whitehead, "The Struggle for Subnational Democracy," *Journal of Democracy*, Vol. 27, no. 2 (April 2016), pp. 155–69, at p. 158.

[2] John Boye Ejobowah, "Democracy, Ethnicity and the Instability Problem: Prescriptive Arguments for a Stable Multinational Federal Democracy in Nigeria," unpublished paper, Wilfrid Laurier University, n.d., p. 12.

the others and giving rise to new conflicts and resource shortfalls in poorer units.

These hazards can be decomposed into five behavioral features, some of which have areas of overlap: antagonistic intergroup relations within devolved units in general; son-of-the-soil ideologies that give priority to specific groups claiming indigenous status; the proliferation of devolved units; the issuance of regulations by regional authorities that are beyond their lawful competence; and, on the other hand and in reaction, recentralization. Several of these can give rise to intergroup discrimination and violence. Devolution to satisfy ethnic claims and aspirations frequently creates hospitable conditions for increased aggressiveness within devolved units after they are created. The desire to rule such a unit frequently incentivizes aggressiveness in order to secure the award of a separate unit.

In this examination, we shall focus mainly on three African and three Asian countries (with occasional glances elsewhere): Ethiopia, Nigeria, and Kenya; India, Indonesia, and Malaysia. Four of these are federations, and two, Kenya and Indonesia, have implemented serious programs of regional autonomy.

Minorities Encapsulated within Units

Suppose devolution is demanded in order to avert secession. Within the putative secessionist region that is to become a unit with federal or autonomous status, there may be regional minorities that fear the new arrangement. In Aceh, there are Javanese and Gayo minorities, many of whose members do not share Acehnese enthusiasm for Islamic criminal punishments, the authority to impose which were among the powers devolved to Aceh and only to Aceh. In Sri Lanka, as we have seen, Tamils demanded a single federal unit in the Northern and Eastern Provinces, in the latter of which Tamils are only a 39 percent plurality and in which Sinhalese and Muslims also reside. The Tamil Tiger insurgency involved a certain amount of violent ethnic cleansing, which made non-Tamils remaining in the East especially reluctant to be subject to devolution there. A federal arrangement that carved these groups out of a federal unit, if that were possible, would be unacceptable to Tamil federalists. An arrangement that left those groups in the unit without minority protections would, in turn, be unacceptable to them. The same situation prevailed in the southern Philippines, where, we have observed, large numbers of Christians and Lumuds reside, along with Moros. The difficult problem of configuring the devolved unit is present in that case. Because of the intermixture of populations, significant numbers of Christians and Lumuds are

incorporated in the Moro region. In each case, the group demanding autonomy claims authority over the whole population of the region, as territory is the basis for demarcating boundaries.

In the Moro case, this authority was legitimized by a referendum won by a majority, but only in some areas. The Lumuds are especially disadvantaged by the creation of the new region. While Moros are a majority in the region's five provinces, the Lumuds are widely dispersed and therefore bound to be a minority almost everywhere. The agreement with the national government recognizes the Moro identity but leaves the interests of the Lumuds, who were "invisible in various political negotiations over their homeland in Mindanao,"[3] unrecognized. Furthermore, Lumud land claims were left to the new Bangsamoro government to settle. In every way, Lumuds are paying for the superior Moro resort to violence to achieve territorial objectives.

Encapsulated minorities are a common and serious consequence of devolution.[4] The problem is most acute when devolved authority has been conferred after violent conflict between the demanding group and the center or between the demanding group and members of minorities in the region who have opposed the demand. If those minorities live in compact areas, special administrative zones for them within devolved regions are possible, and cultural autonomy might be feasible for dispersed minorities in a devolved region. But by the time devolution is seriously on the agenda in conflicted states, most regional majorities are not likely to be interested in measures that dilute their control, and national-level majorities might also wish to retain regional minorities encapsulated in the devolved jurisdiction as a safeguard against secession of the region. Indeed, those minorities may have been settled there in what were once called "colonization schemes" precisely to perform that service.[5]

The destructive possibilities inherent in such situations can be enormous. In South Sudan, which became independent in 2011, the question of controlling the new state quickly created a civil war between Dinka and Nuer, the two largest groups but by no means the only ones.[6] Importantly, this war may

[3] Jose Mikhail Perez, "The Challenges of Moro and Lumad Power-Sharing in the Bangsamoro," *Conflict Studies Quarterly*, Issue no. 35 (2021), pp. 70–88, at p. 71.

[4] Arild Schou, "Conflict Resolution Attempts in Self-Determination Disputes: The Significance of Local Minority-Group Concerns in the Philippines and Sri Lanka," *Ethnic and Racial Studies*, Vol. 37, no. 2 (July 2014), pp. 302–21.

[5] There was some of this in Sri Lanka beginning in the 1950s and, as noted earlier, in Western Sahara after 1975. See Evangelos Liaris, "Settlers, Immigrants, Colonists: The Three Layers of Settler-Induced Conflict in Sri Lanka," in Haklai and Loizides, eds., *Settlers in Contested Lands*, pp. 141–67, and Mundy and Zunes, "Moroccan Settlers in Western Sahara: Colonists or Fifth Column?" in ibid., pp. 40–75.

[6] Carlo Koos and Thea Gutschke, "South Sudan's Newest War," *GIGA Focus* (Hamburg), issue no. 2 of 2014. Dinka and Nuer are also divisible into well-recognized subgroups, some of which have specific antagonisms with some subgroups of the other group.

have been precipitated by the failure of initiatives to create counties in order to alleviate ethnic resentments. These initiatives were abandoned for fear they would create local majority–minority conflicts, as they very well might have done. When they were renounced, it has been argued, the wider conflict in the new country as a whole became the arena for the fear of encapsulated minority status.[7]

Regional autonomy can cause similar violence. Before and after Kenya's 2010 constitution devolved certain powers to 47 counties, some regional officials had made efforts to homogenize their areas. Kenya had had experience with ethnic cleansing in connection with electoral contests, because the constitution earlier required that, to win the presidency, a candidate had to win a majority of the national vote plus 25 percent of the vote in more than half of the eight provinces. In the 2010 constitution, the latter requirement was changed to 25 percent in more than half of the 47 counties.[8] Counties are small enough units for a little violence to go a long way, particularly if the police take sides, as they sometimes do.[9]

From this standpoint, devolution to such small units was a questionable design. Ironically, one of its main purposes was to empower relatively small groups that cannot realistically aspire to power in the country as a whole to be able to control a county. And control it they sometimes do—often to the acute disadvantage of minorities in the county.

Impending regionalization can, by itself, be the occasion for a bout of ethnic cleansing. In Iraq after adoption of the 2005 constitution, some land claimed as part of the Kurdistan region was forcibly cleared of its Turkman population. After the central government retook Kirkuk from Kurdish authorities in 2017, Kurds and Yazidis were victimized, and some were expelled or fled. In a disputed area, expulsion or flight can become a serial phenomenon.

Ethiopia's ethnic federalism has placed great pressure on minorities who live in states controlled by a titular "nationality." The boundaries of those states were drawn, somewhat arbitrarily, by the victors in the war that ousted the Mengistu dictatorship in 1991, and they are far from congruent with the distribution of ethnic groups in the country. The federal constitution states that "All sovereign power resides in the Nations, Nationalities and Peoples of

[7] Andreas Hiblinger and Dana M. Landau, "Governing Conflict: The Politics of Scaling Difference," *Journal of Intervention and Statebuilding*, Vol. 12, no. 3 (2018), pp. 385–404, at pp. 393–95.

[8] 2010 Constitution of Kenya, art. 138(4).

[9] Gabrielle Lynch and David M. Anderson, "Democratization and Ethnic Violence in Kenya," in Bertrand and Haklai, eds., *Democratization and Ethnic Minorities*, pp. 83–102. For examples from Somali areas of Northeast Kenya, see Ngala Chome, "Violent Extremism and Clan Dynamics in Kenya," *Peaceworks*, United States Institute of Peace, Washington, DC, no. 123 (October 2016).

Ethiopia," whose sovereignty "shall be expressed through" their elected representatives.[10] It guarantees to all "nations, nationalities, and peoples" the right to be represented and to participate in federal institutions,[11] but it pays little attention to the relations that prevail inside the states it creates. Although all 11 of Ethiopia's states are home to multiple groups, most states are claimed by titular groups, who commonly deprive others of equal political rights and benefits that derive from those rights. Eight state constitutions explicitly identify the regional state as the homeland of a specific group or groups, reserving governmental power to the homeland peoples. Implicitly, they exclude other groups, often numerous groups comprising a large fraction of the population in the territory, and treat them as non-indigenes with lesser bundles of rights and privileges.[12]

Even in Ethiopian states that purport to be inclusively multiethnic, titular groups discriminate against others. In the large and heterogeneous state of Oromia, for example, the same state constitution that guarantees nondiscrimination expressly states that sovereign power "resides in the people of the Oromo nation."[13] Mayoral positions and a majority of city council seats are reserved for Oromo, regardless of actual population ratios and despite constitutional provisions guaranteeing every citizen the right to be elected.[14] Because most Ethiopian states are designated as ethnic homelands, ethnicity as a mode of authoritative identification takes precedence over territory, even in areas where the titular group constitutes a bare majority or even a minority. Groups not designated as constituent peoples of the states they inhabit are at an acute disadvantage in attempting to exercise rights guaranteed by federal and state constitutions, because in practice—and in accordance with the constitutional conception of Ethiopia as a state of its titular nations—members of those nations come first.

Language regulations can also disadvantage minorities in civil service appointments in some of the Ethiopian regional states, if they require proficiency in the majority language. One result of titular status for majorities is to produce demands by minorities to have themselves and their areas transferred to other states.[15] Contests between groups over who arrived in the region first can produce violence; and subgroups disadvantaged by being

[10] 1995 Constitution of Ethiopia, as amended, art. 8.

[11] 1995 Constitution of Ethiopia, as amended, arts. 8(1), 47(2).

[12] For a brief treatment, see Dunia Mekonnen Tegegn, "Addressing the Plight of Minorities under Ethiopia's Ethnic Federal Structure: A Call for Legal Reform," *International Journal of Constitutional Law Blog*, July 16, 2022.

[13] 1995 Constitution of Oromia, as amended, art. 8(a). Compare ibid. arts. 26, 34(1), 34(2).

[14] A. Ayele Zemelak and Jaap de Visser, "The (Mis)Management of Ethno-Linguistic Diversity in Ethiopian Cities," *Ethnopolitics*, Vol. 16, no. 3 (June 2017), pp. 260–78.

[15] Yonatan Tesfaye Fessha, "The Original Sin of Ethiopian Federalism," pp. 232–45.

part of a larger group, but with only limited opportunities because of that subgroup identity, can demand recognition as a separate group, entitled to its own share, a demand that has resulted in deadly clashes in Ethiopia.

Even where homeland designations have been modified, struggles over group priority persist. In the former Ogaden, an Ethiopian federal unit now called the Somali region and inhabited mainly by Somalis, clan politics has produced struggles over employment, budget, and various forms of state assistance. The change in name was designed to make clear that the designated homeland was established not merely to benefit the Ogaden clan but all Somalis. Inter-clan and intra-clan rivalries—for present purposes, the equivalent of ethnic rivalries—dominate the politics of distribution, and minority clans fare especially poorly. Clan-based parties have dominated politics. The large Ogaden clan is generally dominant, but many inhabitants of the territory have non-Ogaden roots.[16] Conflicts along these lines have been acute, but so have conflicts between "Bantu" farming clans and pastoralist clans, as they have also been in Somalia. Some Bantu clans in Ethiopia have begun to deny their Somali identity and demand a right to self-determination, and a pan-Bantu party was formed to pursue creation of a separate region. Others have merely demanded fair representation, especially where they confront the large Ogaden clan. All such struggles relate to land, representation at the regional level, or control of the local administrative apparatus.

Subregion boundaries in the Somali regional state cross-cut clan territories, so there is generally more than one clan occupying any subregion.[17] Majority clans in each tend to claim that governmental structures belong to them exclusively. Territorial concentration quickly became the crucial ingredient in securing political power. One clan that was widely dispersed among subregions had no representation in the regional legislature. Following violence with other groups, the excluded clan migrated to a new area, where it could form a compact population, only to discover that its presence in the new destination stimulated new outbreaks of violence against it. Ethiopia's homeland exclusions have generated quite a number of such displacements and migrations. By World Bank estimates, in 2019, before the war between the central government and Tigray, Ethiopia had nearly a million and a half internally displaced persons.[18]

[16] Asnake Kefale, "Ethiopian Federalism: Autonomy and Conflicts in the Somali Region," paper presented at the workshop on Decentralization, Federalism, and Conflict, Centre for Research on Inequality, Human Security and Ethnicity, Oxford University, October 5–7, 2006.

[17] See Asnake Kefale, *Federalism and Ethnic Conflict in Ethiopia: A Comparative Regional Study* (London: Routledge, 2013), pp. 75–91.

[18] World Bank, "A Development Approach to Conflict-Induced Internal Displacement," Washington, DC, 2021, http://hdl.handle.net/10986/35505, p. 14.

In the heterogeneous Benishangul-Gumuz regional state, an array of similar conflicts plays out. In Ethiopia's constitutional design for ethnic homeland regions, five groups in Benishangul-Gumuz were designated as homeland groups, none of them approaching 50 percent of the population.[19] The largest are the Bertha and the Gumuz. Each of these two formed a political party, and so did other groups. The Bertha-led party provided the leadership for a pan-ethnic front to govern the region, but the Bertha fell out among themselves along descent lines. As the new dispensation took hold, a member of the Gumuz group was awarded the regional presidency by the central government. In the following elections, the Bertha demanded the presidency. When that was denied, the Bertha demanded, but did not achieve, a separate region for themselves. Seats in the regional legislature were awarded based on group control of local legislatures, which created disparities because the allocations did not reflect the overall regional populations of the various groups, a problem that had to be corrected by a rare intervention of the central government's House of the Federation.

As these conflicts progressed, norms of rotation of the regional presidency evolved, but the rotation was limited to the two largest groups. The interests of non-homeland groups, in the aggregate more than 40 percent of the regional population, were neglected. Unprotected by the federal government, these encapsulated minorities are subject to limited rights concerning employment, land tenure, university admissions (for which homeland groups have preferential access), and even the right to run for office. After attempts to rectify the discrepancy regarding candidates in 2000, some minority candidates were disqualified for lack of knowledge of the official regional language.[20] Eventually, quotas for candidacies on the ticket of the party related to the national ruling party were awarded on a formula that favored the homeland groups, but even this was disrupted by actual election results.

The Ethiopian design illustrates the perils of devolution to homeland groups in heterogeneous areas. Federalization based on regions that were asserted to belong to homeland groups was at odds with the actual distribution of population in Ethiopia. Even in the largest homeland regions, Oromia and Amhara, the population is scarcely homogeneous, and in urban areas in both it is exceedingly heterogeneous. In other, even more heterogeneous regions, exemplified by the Somali and Benishangul-Gumuz regions, conflicts play out within homeland groups, among homeland groups, and

[19] My account in the following paragraphs follows closely that of Kefale in ibid., pp. 92–107.

[20] A problem rectified three years later, when it was determined by the House of the Federation that minorities could stand as candidates, since the working language of the region was actually Amharic, a lingua franca that they could speak.

between them and various groups of settlers from other regions and their descendants. The largest groups tend to be preferred over the smaller homeland groups, and both prevail over those without the homeland designation, who may be stigmatized as outsiders. For disfavored groups, minority protection has been scarce, participation in government has been limited, and mechanisms of intergroup conciliation at the regional level are close to nonexistent.

Where regional devolution is based on ethnic homelands, territorialization below the regional level tends to replicate the homeland principle for localities, whether deliberately or not. Where this occurs, it makes groups that are widely dispersed vulnerable to various forms of predation, and in heterogeneous local areas it makes possible a pernicious form of ascriptive majoritarianism.

Discrimination against minorities in heterogeneous Indian states has been common for decades. Victims have included Bengalis in Assam, Tribals in Bihar, and Coastals in the Telangana region of formerly undivided Andhra Pradesh.[21] A devolved system that permits claims to indigenousness can, without effective restraints, make ethnic-group membership the key to access to opportunities. After decades of conflict, in which people from the Telangana region of Andhra Pradesh attempted to exclude people from the coast—indeed, all non-locals (non-*mulkis*)—from employment and eventually demanded a separate state to facilitate the exclusion, the two regions were divided into two states in 2013. Before the split, the *mulki* rules in Telangana required 15 years of residence in the region to qualify a person to work in the public sector there.[22] Elsewhere in India, the desire of putative indigenes to discriminate or the desire of designated non-indigenes to escape from discrimination has fueled multiple movements for new states or new sub-state units.

Many of these demands for sub-state units are ultimately successful, especially among designated "tribal" groups in the heterogeneous Northeast of the country and typically after protracted violence. In the units that sometimes emerge from these demands, discrimination against small minorities becomes harder to detect and control, especially if the units proliferate.

In the background is the British colonial administration's desire to protect the designated Scheduled Tribes, differentiated from the Hindu and Muslim populations and often economically disadvantaged. Protection implied restricted entry of non-tribals into their areas. A colonial version of these

[21] See Myron Weiner, *Sons of the Soil: Migration and Ethnic Conflict in India* (Princeton: Princeton University Press, 1978).

[22] Anderson, *Federal Solutions to Ethnic Problems*, p. 173.

restrictions, the Inner Line system that required permits for outsiders to reside there, still requires permits for them to enter four of the states of the Northeast—Arunachal Pradesh, Manipur, Mizoram, and Nagaland—and has given rise to demands for an Inner Line permit system to be applied in Assam and Meghalaya as well. From early on, discrimination against outsiders was considered to have a benign purpose, and it still is. The victims these days are other tribal groups as well as migrants from other states.

Configurations in Northeast India vary, and so do outcomes. In order to quell an insurgency, Nagaland was recognized as a separate state in 1963. The attempt was only partially successful, as secessionists fought on. Although it seems to be a homogeneous state, Nagaland is divided by subgroups that had shared power in an arrangement that ended in 1974. Since 2010, "five backward eastern Nagaland tribes have demanded a separate State called 'Frontier Nagaland'," in order to "overcome their perceived 'marginalization' and 'discrimination'" at the hands of dominant subgroups.[23] When homogeneous units are created, subgroup heterogeneity is likely to become more prominent and more politically salient.

In heterogeneous units, minority discontent is common. In Tripura, which became a state in 1972, the Mizo minority has long demanded a regional council in which it could govern itself.[24] Yet, in Mizoram, which became a state in 1987, also as the product of an insurgency, the Mizo majority has sought to hinder any carved-out autonomy for the Chakma minority, which it contends does not belong in the state.[25] Chakma control very few of the reserved seats in the state legislature, and they complain bitterly of discrimination in, for example, admission of qualified Chakma candidates for medical education. Encapsulated groups and subgroups are frequently discontented, and a victimized group in one area can become the victimizer in another.

Perhaps the most egregious territorial settlement in the Northeast responded to some serious ethnic cleansing. Assam is a very heterogeneous state consisting of Assamese, Bengalis, multiple tribal groups, and descendants of people from other Indian states. In the 1980s, an organization of Bodos, a tribal group comprising well under 10 percent of the population of Assam but claiming to be the original inhabitants of the state, created a

[23] Kham Khan Suan Hausing, "Autonomy and the Territorial Management of Ethnic Conflicts in Northeast India," *Territory, Politics, and Governance*, Vol. 10, no. 1 (2022), pp. 120–43, at p. 136.

[24] Subir Bhaumik, "Ethnicity, Ideology and Religion: Separatist Movements in India's Northeast," in Satu P. Limaye et al., eds., *Religious Radicalism and Security in South Asia* (Honolulu: Asia-Pacific Center for Security Studies, 2004), pp. 219–44, at p. 226. The 1949 Constitution of India, as amended, art. 244, allows the formation of autonomous district councils.

[25] Bhaumik, ibid.

movement for a separate state. The Bodos utilized violent tactics, at first in areas inhabited by Assamese.[26] After Assamese state officials proved conciliatory and an accord was reached in 1993, the organization no longer targeted Assamese. With boundaries of the new region uncertain, and finding it difficult to create a contiguous area, armed Bodo forces carried out raids in Adivasi (aboriginal tribes) and Bengali areas of Assam.[27] The raids appeared to be designed to drive those groups (and also Nepalese) from the state,[28] so as to create a homeland in which Bodos might be a majority in at least a portion of the state. When confronted with the need for a Bodo majority to secure an autonomous unit, a Bodo leader stated explicitly: "This is all our land and non-Bodos have come and settled here from time to time. So changed demography cannot be used against our aspiration for autonomy. If therefore we do not have a majority, we might consider creating one."[29] Where majorities are necessary for unit creation, ethnic cleansing is one means to attempt to create majorities if they do not already exist. The temptation is not unique to Bodos, but their ambition was overwhelming.

In the Bodo case, ethnic cleansing was extensive—by some estimates, forcible displacement of other populations over the course of the 1990s reached into the hundreds of thousands[30]—but was still insufficient to create a Bodo majority of the population in the region claimed. Nevertheless, the violence was sufficient to make good the claim for a dedicated unit to be established. The Assam state government responded to Bodo claims in 1993 by creating the Bodoland Territorial Autonomous District (BTAD), an autonomous region in Assam, one with more than symbolic powers, which were augmented with the creation of the Bodoland Territorial Council (BTC) in 2003 and then the Bodoland Territorial Region (BTR) in 2020.[31] At the time the BTC was created, the insurgent Bodo Liberation Tigers (BLT) became a political party and a coalition partner in the state government.

[26] For various occasions for Bodo violence, see Chris Wilson, "Ideological Motives in Spoiler Violence: Postconflict Assam, Northeast India," *Nationalism and Ethnic Politics*, Vol. 23, no. 3 (2017), pp. 281–96.

[27] Uddipana Goswami, *Conflict and Reconciliation: The Politics of Ethnicity in Assam* (New Delhi: Routledge, 2014), pp. 153–54.

[28] See Donald L. Horowitz, *The Deadly Ethnic Riot* (Berkeley: University of California Press, 2001), p. 413. In 1983, Bodos had attacked a string of 10 Bengali Muslim villages, killing some 1,383 people (or more) in a matter of 4 hours. Ibid., pp. 228–29.

[29] Quoted in Goswami, *Conflict and Reconciliation*, p. 154.

[30] See Mahasweta Satpati, "Ethnic Cleansing in Areas of Bodo Concentration in Assam, India, Using GIS Techniques," paper presented as a poster at the XXVI 2009 Conference of the International Union for the Scientific Study of Population, http://iussp2009.princeton.edu, describing the displacement of an estimated more than 300,000, of whom approximately 60–80,000 remained displaced as of 1998.

[31] For this progression, see Goswami, *Conflict and Reconciliation*, which depicts the history of the Bodoland devolution in detail.

With each iteration, Bodo rule came with powers increasingly resembling those of an Indian state, but without the designation. Bodos were awarded 65 percent of the seats in the BTC, although they comprised just 31 percent of the total population governed by the council.[32] In 2020, when the BTR was formed, the number of seats was enlarged to 60, of which a maximum of only 16 are open for candidates of any group to contest and only two are reserved for non-Bodos.[33] A non-Bodo, Naba "Hira" Sarania, had led the initiative for the expansion in the number of seats. Sarania, a former leader of an armed group that had sought secession of Assam from India, and now a very successful electoral politician, was attempting, by urging expansion of the number of seats, to rectify the Bodo-minority domination of the territory. Depending on the final proportions of Bodos and non-Bodos included in the newly configured territory and the election results in those newly defined seats, it is likely that the enormous disproportion between the Bodo population of the territory and the Bodo majority of council members might be reduced, at least somewhat. The formula for inclusion and exclusion of areas in the new territory, discussed below, does not permit a clear answer, despite what will certainly be at least a somewhat larger proportion of Bodos in the territory.

The complexities do not end there. Because Northeast India is a highly pluralistic area, the interests of multiple tribal and non-tribal groups, often living in close proximity, inevitably—and dangerously—impinge on each other. As it happens, the territory claimed by another group, the Koch-Rajbangsi, cross-cuts the territory administered by the Bodo Territorial Council[34] and also cross-cuts areas with large numbers of Assamese. The Koch-Rajbangsi had long demanded a large territory of their own called Kamatapur. The Koch-Rajbangsi are a tribal group that aspires to be designated a Scheduled Tribe, a designation (held by the Bodos, among many others) that carries with it various preferences, including those in education and political representation. In 2020, the Assam government, in cooperation with the Indian Home Ministry, created a Kamatapur Autonomous Council, whose jurisdiction would exclude areas previously in the BTC and another group's council area as well. Even so, the result is that not all Koch-Rajbangsi can be

[32] Of the seats in the council, 30 were reserved for Bodos, 5 were reserved for non-Tribals, 5 were left for open contests, and 6 were to be nominated by the government. See Harihar Bhattacharyya, Kham Khan Suan Hausing, and Jhumpa Mukherjee, "Indian Federalism at the Crossroads: Limits of Territorial Management of Ethnic Conflict," *India Review*, Vol. 16, no. 1 (2017), pp. 149–78; Hausing, "Autonomy and the Territorial Management of Ethnic Conflicts in Northeast India," p. 17.

[33] *Times of India*, February 5, 2020.

[34] Goswami, *Conflict and Reconciliation*, p. 41.

accommodated in the Kamatapur Autonomous Council area, and some will therefore be stranded in areas controlled by other groups outside it.[35]

At the same time, an effort was announced to reconfigure boundaries of the new BTR. Villages contiguous to the former BTAD could apply to be included if more than 50 percent of their population consisted of Bodos. Villages with more than 50 percent non-Bodos could apply to be excluded.[36] Obviously, this would make it easier to accommodate conflicting territorial claims, such as those of the Koch-Rajbangi, but it does not guarantee that Bodos will actually be a majority in the new BTR. Conceivably, depending on the territorial and electoral arithmetic, the changed regional configuration could make Bodos unhappy about the exclusion of Bodos from the region in areas where they do not surpass the 50 percent number and simultaneously make non-Bodos who are included in the region against their will equally unhappy.

This majoritarian standard for inclusion in the BTR would reconfigure the territory controlled by Bodos in a new dispensation that was otherwise favorable, but would also leave some, perhaps many, Bodos outside the BTR. It was inevitable, therefore, that some Bodos, already deeply divided, would object. And within approximately a year after the creation of the BTR, an organization involved in the negotiations to create it in 2020 took a position opposed to excluding villages previously incorporated in the BTAD.[37]

As we have seen, Bodos are a group that is heavily intermixed with others. Bodos are often a minority in a village. Yet their authority over their neighbors, reinforced by the coercive power of Bodo militants who are willing to use force to persuade state and central governments to their position, is considerable. Unsurprisingly, ethnic groups comprising the majority in the territory began to organize against minority domination, and violence in the region is still common.

So far, we have considered Bodos a single group, but there are significant fissures among them. There are some major religious differences between western and eastern Bodos, and there were formerly organizational differences between the BLT, which had tied itself to the former Congress government in New Delhi, and a rival body that had no such connections. These intraethnic divisions had contributed to further violence in some areas of Bodo concentration.[38]

[35] *The Wire* (New Delhi), September 4, 2020. Two other new units were created as well.
[36] *Hindustan Times*, September 25, 2020.
[37] Giriraj Battacharjee, "India: BTC/BTR Tension in Assam—Analysis," *Eurasia Review*, May 29, 2021.
[38] Goswami, *Conflict and Reconciliation*, pp. 96–98, 141–42. Beginning in 2016, Bodo leaders have been allied with the BJP (Bharatiya Janata Party) coalition ruling in New Delhi and in Assam.

More devolution to satisfy the aspirations of groups to control a slice of Assam and other states in the Northeast of India is nearly always in the works. It is not bare solicitude among federal and state politicians for the problems of tribal and other groups that drives these moves but opportunities to cultivate political support.[39] Inevitably, because of the intermixture of populations, that means that majorities of one group will rule over minorities of other groups or, in the case of Bodoland—depending on adjustments to boundaries—and in some other areas, that minorities will rule over majorities.

Devolution in the rest of the Northeast has not uniformly had results as suffused with recurrent violence as those in Bodoland.[40] Yet, as we shall see, very often devolution in heavily heterogeneous areas responds to claims supported by violence and has produced territorial boundaries that are difficult to justify by reference to any other standard than responses to violence and are difficult to square with constitutional guarantees for minorities, even when not the result of violence.

As these illustrations imply, the Indian government has been utilizing three tiers of administration to cope with heterogeneous territories. Early on, in the 1950s, India began to reorganize states along linguistic lines, staunchly refusing recognition on religious grounds until, in 1966, it separated Punjab into a Sikh-majority state of that name and a Hindu-majority Haryana, based on the somewhat fictitious ground of differences in the languages supposedly spoken by Sikhs and Hindus.[41] In Andhra, subethnic differences, again rationalized by some relatively small interregional linguistic differences, formed the basis for partitioning the state in 2013.[42] In India's Northeast, where groups classified as tribal created movements for independence or for separate states, statehood was granted, but only rarely, given the heterogeneity of most areas. Below the state level, there have been multiple arrangements, typically with limited legislative power but some with merely advisory power, as the Indian government came to recognize the difficulties

[39] They are driven not just by politics in that state but by the aims of the BJP government in New Delhi and the Congress government before it to consolidate its following in the region.

[40] See Bhattacharyya et al., "Indian Federalism at the Crossroads," p. 168.

[41] In the 1960s, when Sikhs were agitating for a separate state, which the central government was unwilling to grant on grounds of religious difference, Hindus were urged to claim (falsely) that their language was Hindi, rather than Punjabi, in order to leave the Sikhs in a linguistic minority and thereby defeat the claim for a separate state. For this census battle, see G. D. Khosla, *A Taste of India* (Bombay: JAICO, 1970), pp. 144–49. In the end, a Hindu-majority Haryana state was established alongside a Sikh-majority Punjab.

[42] There had also been longstanding frictions and historical differences among regions, as Hyderabad in Telangana had formerly been a princely state, with an Urdu-speaking Muslim population.

created by empowering a single group in a territory inhabited by several.[43] We shall deal in detail with the Indian constitution's Sixth Schedule, which regulates devolution in the Northeast, at a later point.

As we have witnessed, one such carve-out usually leads to demands for others, as groups seek to escape control of the unit by people with whom they have developed antagonistic relations. The frequent response of the state and federal governments—to reserve seats in proportions that, when added together with the votes in open seats, effectively build in ethnic-majority (or -minority) rule in conflict-prone areas—is hardly calculated to produce satisfaction across group lines.

Katharine Adeney comments on the Indian experience with heterogeneous units that units should be made as homogeneous as possible.[44] In some parts of India, however, intermixture of groups is such that homogeneity cannot be achieved without repeated creation of new units, and usually not even then. And unit proliferation, as I shall suggest, frequently comes with its own serious problems.

Like Bodos of Assam, the Gagauz of Moldova are a small minority (at most, 5 percent) of the total population of Moldova. We have already seen that Moldova's new constitution of 1994 authorized regional autonomy for the Gagauz, who are Turkic Christians, and a statute enacted in the same year created a region called Gagauzia, to include any area in which Gagauz form more than 50 percent of the population, and less than 50 percent if there is a majority vote in the area for inclusion. The problem is that Gagauz-majority areas are not uniformly contiguous, and some communes in Gagauzia have a Gagauz population of less than 30 percent. Devolution to favor dispersed minorities can, without safeguards, easily impair the interests of others living in the vicinity.

Virtually every decision to realign territory in India responded to an ethnic homeland movement, and in the Northeast the movements were invariably violent. That fact, combined with the heterogeneity within regions, has produced discontent among minorities—or sometimes, as in Bodoland, majorities—encapsulated in new units. In many cases, this discontent leads to more violence. As I have mentioned, the Moro region in the southern Philippines has encapsulated Christian and Lumud minorities and, in some areas, has only a Moro minority. In Gagauzia, population proportions have not yet

[43] Harihar Bhattacharyya, "Federalism and Regionalism in India: Institutional Strategies and Political Accommodation of Identity," Heidelberg Papers in South Asian and Comparative Politics Working Paper no. 27, May 2005, pp. 20–21.

[44] Katharine Adeney, "Does Ethnofederalism Explain the Success of Indian Federalism?" *India Review*, Vol. 16, no. 1 (2017), pp. 125–48.

been a major problem, but in Bodoland and the Bangsa Moro Autonomous Region, with their long histories of conflict, encapsulated groups, whether majority or minority, are not likely to accept regional domination easily.

Groups can become deeply unhappy about being placed in what they believe is the wrong unit, with (as they see it) the wrong people, who victimize them. That is especially the case when state authorities respond to demands only when supported by violence, thereby producing an incentive to violence and the possibility that groups discontented with their encapsulated status will also then resort to violence. Northeast India and the southern Philippines exemplify the perils of strategies of rewarding violence with devolution.

There is another problem of regional encapsulation that can occur. Where there are two large groups and multiple small groups, devolution can become a tacit conspiracy of the large against the small. When North Macedonia, with its approximately 64 percent Slavic Macedonian and 25 percent Albanian population, agreed in 2001 to devolve power to localities with a minority population of 20 percent or more, the principal beneficiaries were Albanians, while third groups, such as Turks, Roma, Serbs, and others, totaling more than 10 percent of the population, and in some areas significantly more, were neglected.[45] The same, as we have already seen, has been true in Ethiopia, and it also true in some of Kenya's counties, and elsewhere.

Indigenousness

Among the claims made by the Bodos in Assam was the assertion that their presence in the area antedated the arrival of other groups. This was a claim with a certain plausibility and even attractiveness, if only because illegal migration, especially from East Bengal (later Bangladesh), and occupation of land by migrants had been on the political agenda of Assam for decades. Assam, however, is not unique. Contests between and among groups over who arrived first in the country, or the region, or the locality are recurrent. They form the basis for demands for priority, for ethnic preferences, and for separate regions in country after country, and they frequently produce violence to support these demands or simply to counter claims to equal treatment. These are a critical subset of contests between encapsulated groups.

[45] See Aisling Lyon, "Decentralization and the Strengthening of Consensual, Participatory Local Democracy in the Republic of Macedonia," *Democratization*, Vol. 22, no. 1 (2015), pp. 157–78.

Prior occupation of territory becomes a salient line of division wherever large-scale immigration occurs. Even in more restricted local settings, the identity of those who arrived first is likely to have some significance. Among southern Philippine fishermen, families that had originally moored their boats at a particular location before others had are accorded certain rights, prestige, and pride of place; and in the event of disagreement, the others are disparaged as "outsiders," no matter how many years they may have moored at that location.[46] Early in the twentieth century, among French Canadian and Irish families who immigrated to New England after Protestant groups did, there was a tendency to offer mild deference to those first families who had arrived earlier, whom relative newcomers saw as the "Charter Group" in the region. In turn, the "Yankees" exuded a sense of priority and proprietorship.[47] Perhaps not universally, but very commonly, who arrived first—or claims to have arrived first—can become a source of intergroup differentiation that can produce serious division in a society in which political and economic opportunities seem to follow cleavage lines.[48]

Indigenousness then becomes an ideologized rationale for exclusive or preferential possession that motivates and justifies discrimination or violent expulsion.[49] As we have already witnessed, official or unofficial designations of homelands frequently give rise to sentiments of group priority on earlier-arrival grounds. With or without such designations, devolution creates a bounded field in which son-of-the-soil preferences can be indulged to exclude people who are unable to make such claims or to have their claims recognized. Such designations then become what Clifford Bob has called "rights as weapons,"[50] in this case offensive rather than defensive weapons, used in conflict.

As I have mentioned, son-of-the-soil preferences in employment and other spheres of economic activity have long been practiced, officially and unofficially, in many parts of India, not merely in the Northeast.[51] They have taken many forms, sometimes masquerading under constitutional protections for backward sections of the population (those intended to benefit lower castes),

[46] H. Arlo Nimmo, *The Sea People of Sulu* (San Francisco: Chandler, 1972), p. 40.

[47] Elin Anderson, *We Americans* (Cambridge: Harvard University Press, 1937), pp. 21–24.

[48] For the multiple accelerants of such sentiments in colonial and post-colonial Africa, see Gabrielle Lynch, "The War of Who Belongs Where: The Unstable Politics of Autochthony on Kenya's Mt. Elgin," *Ethnopolitics*, Vol. 10, no. 3–4 (2011), pp. 391–410, at p. 394.

[49] As it did in Georgia in the former Soviet Union, as I mentioned earlier, when Abkhaz claimed they had preceded the arrival of Georgians in the territory, a claim that underpinned a considerable degree of ethnic cleansing that occurred after the dissolution of the Soviet Union.

[50] Clifford Bob, *Rights as Weapons: Instruments of Conflict, Tools of Power* (Princeton: Princeton University Press, 2019).

[51] See Weiner, *Sons of the Soil*.

sometimes using language requirements as a proxy for ethnicity. Politicians have seized on these preferences to enhance their "vote banks." Extremist organizations, such as Shiv Sena in Bombay and senas (armies) elsewhere, have, in the past, been their main proponents and sometimes enforcers. A new wave of such preferences in several Indian states has resulted in legislation reserving up to as much as 75 or 80 percent of private-sector positions (sometimes with a salary limit above which preferences would not apply[52]) for people deemed to be local residents as against those who are seen as migrants from outside the state.[53]

These laws are inconsistent with constitutional guarantees against discrimination in employment. Descent, place of birth, and residence are among the forbidden grounds.[54] Parliament is authorized to make exceptions for residence requirements for government positions and may also make exceptions for deprived sections of the population.[55] Beneficiaries of these exceptions are defined somewhat differently from one section of the constitution to another, but they embrace Scheduled Castes, other backward classes (OBCs) (also defined in caste terms), and Scheduled Tribes. There is no general warrant for Indian states to discriminate on grounds of residency status, which the constitution expressly forbids. Even lawful preferences, such as those for backward classes, do not constitute a blanket exception to the equality provisions. Determinations of which castes might be designated as economically backward and entitled to preferential treatment have long been subjected to judicial review, and many such determinations have been struck down as excessive.[56]

Although the Indian courts were slow to react to state son-of-the-soil preferences, there is no doubt that, based as they are on descent or historical residence, they are unlawful, except in certain cases specified in the constitution. Territorial preferences, even those apportioning applicants for government positions in state government preferentially by district, in order to redress intrastate regional underrepresentation, have been rebuffed in the Indian courts. The courts have declared, in no uncertain terms, that India

[52] Such as that provided by the Haryana State Employment of Local Candidates Act, 2020, Act no. 3 of 2021, sec. 3. The act applies to positions with private employers paying gross monthly salaries under 50,000 rupees. A local employee is one born or domiciled in Haryana. Domicile can be established after a minimum of 15 years of residence in the state.

[53] For a brisk survey, see Sagarika Ghose, "The Great Walls of India: Sons-of-the-Soil Demands Are Being Enshrined with Special Laws in Many States, from MP to AP," *Times of India*, September 11, 2019.

[54] 1949 Constitution of India, as amended, arts. 14, 15(2), 16(1), 16(2).

[55] Ibid., arts. 15(3), 15(4), 15(5), 16(3), 16(4).

[56] See Marc Galanter, *Competing Equalities: Law and the Backward Classes in India* (Berkeley: University of California Press, 1984), pp. 215–19.

is one country in which anyone can live anywhere without suffering disadvantage and that there can be no state-level citizenship that distinguishes between insiders and outsiders.[57]

Yet son-of-the-soil preferences still appeal to politicians, and the most recent spate may need to be struck down one at a time. Although Indian politicians and ethnic chauvinists at the state level can be persistent in pursuing this form of devolved discrimination against those they see as vulnerable outsiders, the Indian courts do not lack either power or popular regard to work effectively against this dysfunction of federalism.[58] It will be a recurrent battle.

Preferences for Scheduled Tribes that disadvantage others in India's Northeast sit on a firmer constitutional foundation of exceptional, permissive arrangements originally founded upon the desire to uplift the "most vulnerable and victimized of Indians."[59] It is this discrimination in favor of Scheduled Tribes within devolved units, often very severely constricting opportunities for those disadvantaged by them, on which we shall concentrate our attention with respect to India as we move forward, but case law dealing with other preferences can be helpful.

Many of Ethiopia's problems with devolution derive from homeland designations of multiple states, which then cause conflict with non-homeland "guests" on the devolved territory. As sometimes happens, homeland claims in Ethiopia are extended downward to lower territorial levels, especially, but by no means exclusively, cities. The Ogaden conflicts with encapsulated groups, discussed earlier, occur not merely because of majority–minority politics, but because minorities are often seen as people who have come from elsewhere. Claims of indigenousness are very common within regions, not only in Ethiopia, where many cities experience conflict between those with claims to have arrived first and those said to have come later, and where son-of-the-soil discrimination is especially compatible with the strongly held official conception of homelands,[60] but in many countries, because local groups aim to exclude migrants—whether the migration occurred recently

[57] The leading case is Dr. Pradeep Jain v. Union of India, 1984 AIR 1420, 1984 SCR(3) 942 (Sup. Ct.). See also, e.g., Govind A. Mane & Ors. v. State of Maharashtra, 102(2) Bombay Law Reporter 669, AIR 2000 SC 1576 (Sup. Ct.) (preferences based on district origin invalid); Sunanda Reddy v. State of Andhra Pradesh & Ors., 1995 AIR 914, SCC Suppl. (2) 235 (Sup. Ct. 1995) (preferences based on language invalid).

[58] See Jagdish Saran v. Union of India, AIR 1980 SC820 (Sup. Ct.); State of Assam v. Sitalakshmi Srinivasan, 2014(4) GLT 396 (Gauhati High Ct.).

[59] Ramachandra Guha, quoted in Arun K. Thiruvengadam, *The Constitution of India*: *A Contextual Analysis* (Oxford: Hart Publishing, 2017), p. 190.

[60] See, e.g., Milkessa Midega, "Ethiopian Federalism and the Ethnic Politics of Ethiopian Cities: Consociationalism without Competitive Multiparty Politics in Dire Dawa," *Ethnopolitics*, Vol. 16, no. 3 (June 2017), pp. 279–94; Jan Erk, "Nations, Nationalities, and Peoples: The Ethnopolitics of Ethnic Federalism in Ethiopia," in ibid., pp. 219–31.

or in the distant past—regardless of whether the region is designated as a homeland.

Rakhine State in Myanmar, where Rakhine people claim that Rohingya are recent Bengali migrants who are not entitled to citizenship and certainly not entitled to equal treatment, has experienced serious mass violence against Rohingya, including a wave of killings and expulsions by the Burmese army in 2017. Rakhine state purports to be a homeland of a Arakanese-Buddhist ethnic minority.

Indonesia's regions are not officially designated homelands, and yet regional autonomy has also given rise to discriminatory practices in favor of *putera daerah* (sons of the region). Much of the serious violence that accompanied the creation of autonomous regions was motivated by the desire of particular groups to assert indigenous status and deprive others, seen as recent migrants, of the fruits of devolution.[61] Devolution produced races around the country to claim hegemony over the new districts. Very often those claims were underpinned by assertions of indigenousness, sometimes competitive assertions, as we shall also see in Nigeria, and they were enforced by violence, in some cases before district lines were even drawn. Occasionally, their effect was to induce Indonesian authorities to divide areas that had previously been administered together, in order to separate warring groups into separate jurisdictions. Ethnically heterogeneous regions have had recurrent problems of inclusion.

Nigeria's serious attempts at fair representation of ethnic groups in all governmental institutions generated a variety of dysfunctional consequences for ethnic relations at the state and local level. In the background were struggles over the distribution of opportunities going back to the colonial period and accelerating after independence in 1960, especially in the Northern Region. At that time, well-qualified Igbo migrants in civil service positions generated hostile reactions.

The 1960 and 1963 constitutions, both dating to the period when there were only a few regions and no states, had no requirement of indigenousness to enjoy rights and privileges in a region. Slowly, however, regional and, therefore, to some degree ethnic, quotas were being introduced, first for educational institutions in 1958, for the military officer corps in 1962, and then for the federal civil service, through what was called "balanced recruitment,"

[61] See, e.g., Jamie S. Davidson, *From Rebellion to Riots: Collective Violence on Indonesian Borneo* (Madison: University of Wisconsin Press, 2008); Risa Toha, "Political Competition and Ethnic Riots in Democratic Transition: A Lesson from Indonesia," *British Journal of Political Science*, Vol. 47, no. (2015), pp. 631–51; Rachel Diprose, "Passing on the Challenges or Prescribing Better Management of Diversity? Decentralization, Power Sharing and Conflict Dynamics in Central Sulawesi, Indonesia," *Conflict, Security & Development*, Vol. 8, no. 4 (December 2008), pp. 392–425, at pp. 403, 408–09.

in 1975.[62] By that time, the country's 4 regions had been divided into 12 states. Even if these were state, rather than ethnic, quotas, there was a *de facto* ethnic element to them, as larger groups within states were most often their beneficiaries.

The principle of fair representation of ethnic groups was first introduced into the 1979 constitution, which stated, in a non-justiciable Directive of State Policy, that the composition of the federal government and all of its agencies should reflect the "federal character" of the country, in order to prevent the predominance of people from a few states or a few ethnic groups in government bodies.[63] The very next subsection, also identical to that of 1979 and repeated in the 1999 constitution, announces an analogous requirement for states and local authorities. "The composition" of those governmental bodies and the conduct of their business "shall be carried out in such manner as to recognize the diversity of the people within [their] area of authority and the need to promote a sense of belonging and loyalty among all the people of the Federation."[64] The thrust of these provisions was to emphasize the need for inclusion and plurality rather than exclusion and limited group ownership of states and local government authorities (LGAs).

In 1996, a Federal Character Commission was set up to insure that positions in the federal bureaucracy and other public institutions reflect the proportions of indigenes of the various states.[65] The 1999 constitution repeated a provision of the document of 20 years earlier that there be at least one federal cabinet minister from each state and, in a fateful stroke, that the minister be "an indigene of that state."[66] In a clause on interpretation of provisions, again following language from the 1979 constitution, the phrase "belongs to"—as in *belongs to a state*—refers to a person "either of whose parents or any of whose grandparents was a member of a community indigenous to that state."[67] This definition, drawn from the Nigerian citizenship provisions of the 1960 constitution,[68] was, one might think, intended to create criteria for eligibility to be counted as an indigene of a state in the federal cabinet, but it was not explicitly limited in that respect, and the word "indigenous" was not defined.

[62] John Boye Ejobowah, "Ethnic Conflict and Cooperation: Assessing Citizenship in Nigerian Federalism," *Publius*, Vol. 43, no. 4 (2013), pp. 728–47, at p. 738.

[63] 1979 Constitution of Nigeria, as amended, art. 14(3). The provision is repeated in the 1999 Constitution, art. 14(3).

[64] 1999 Constitution of Nigeria, as amended, art. 14(4).

[65] Nigeria Federal Character Commission (Establishment, Etc.) Decree no. 34 of 1996.

[66] 1999 Constitution of Nigeria, as amended, art. 147(3); 1979 Constitution of Nigeria, as amended, art. 135(3).

[67] Ibid., 1999, art. 318(1); 1979, art. 277(1). The executives of every political party must include members who "belong to" at least two thirds of the states. Ibid., 223(2)(b).

[68] 1960 Constitution of Nigeria, as amended, art. 7(1).

The indigenousness provisions were designed to guarantee that no single group could dominate the whole country. In the background were the events of the 1940s through the 1960s and the fears those events created, especially in the Northern Region. A "Northernization" policy, designed to indigenize the regional government, was adopted.[69] In the national elections just before independence, a government dominated by Hausa-Fulani from the North took power, creating great resentment in the South. Following a coup in 1966 made overwhelmingly by Igbo officers, there was great violence against Igbo in the North. Later that year, a countercoup was organized by northern officers, precipitating more such violence and mass migration of Igbo back to their ancestral homes in the Eastern Region. That return was the prelude to the war of secession in an Igbo-dominated Biafra.

The multi-state indigeneity requirement for the cabinet, adopted during a conciliatory period after the Biafra war, was an answer to those earlier fears of domination by a single group.[70] The requirement that only indigenes of a state could secure federal cabinet positions foreclosed the possibility that a president might appoint members of his or her own group, residing in states all over the country as a result of previous migration, to control the cabinet. It was intended to achieve, as the constitution asserts, fair representation of groups at the national level.

The failure to limit the scope of indigenous preference only to the composition of the federal cabinet had enormous—and, as we shall see later, not wholly unintended—consequences. In spite of the provision favoring inclusion and plurality at the state and local levels, the indigenousness provisions set in motion competitive quests for indigenousness at those levels. Some of these contests have become furious, because, in the states and localities, too, "indigenes" are also preferred in civil service employment, admission to educational institutions, scholarships, contract awards, and sometimes land acquisition.[71] In practice, this often means that those designated as non-indigenes, defined by their inability to procure a certificate of indigenousness

[69] See James S. Coleman, *Nigeria: Background to Nationalism* (Berkeley: University of California Press, 1958); C. S. Whitaker, *The Politics of Tradition: Continuity and Change in Northern Nigeria, 1946–1966* (Princeton: Princeton University Press, 1970); Paul Anber, "Modernization and Political Disintegration: Nigeria and the Ibos," *Journal of Modern African Studies*, Vol. 5, no. 2 (1967), pp. 163–79.

[70] Another answer was the separation of powers of a presidential system, adopted to prevent a monoethnic legislative majority from being able to govern the country alone. Reinforcing this protection was a presidential electoral system that required a plurality plus territorial distribution of the winner's vote, to assure a nationwide, rather than merely sectional, mandate for the winner. 1999 Constitution of Nigeria, as amended, arts. 133, 134.

[71] For the growth of the indigeneity principle, see Brandon Kendhammer, "Getting Our Piece of the National Cake: Consociational Power Sharing and Neopatrimonialism in Nigeria," *Nationalism and Ethnic Politics*, Vol. 21, no. 2 (April–June 2015), pp. 143–65, at pp. 154–58.

from their Local Government Administration, are excluded from these benefits altogether. When new states were carved out of larger states, those who were indigenes in a larger state but were no longer indigenes in the territory of the new, smaller state were deprived of government employment and other benefits and told to "go home."[72]

In its chapter on Fundamental Rights, the Nigerian constitution, ironically enough, grants a right of citizens to reside anywhere in the Federation,[73] prohibits discrimination on grounds of ethnic origin,[74] and affirms the duty of the state to "encourage free mobility of people … and full residential rights for every citizen in all parts of the federation."[75] The constitution also proclaims that the composition of a state government or local authority must "recognize the diversity of the people within its area of authority …."[76]

The system of birth-based preferences framed to benefit indigenes, however, has produced the opposite result, a nationwide pattern of discrimination created in the ostensible interest of fairness. States are often conflicted over the identity of indigenous groups. For example, whether the Hausa or the Berom, both large groups, are indigenous to the large city of Jos in Plateau state is a perennial issue. Berom (and two other groups, Afizere and Anaguta) are said to have arrived earlier in the state, whereas Hausa claim to have occupied the city first. Similar disputes over indigeneity, such as those between Tiv and Jukun in Taraba and Benue, occur in a number of states. For life chances, the stakes of a determination one way or another are high. Serious violence over such questions is common,[77] and those declared to be non-indigenes are deprived of the privileges of that status (often including the right to run for office) even if they have lived in the state since birth.[78] Despite frequent criticism, this regime of preferences, has survived.

Preferences for indigenes in Nigeria extend right down to the level of the 774 LGAs. LGAs are permitted to determine indigenous status. This

[72] See the discussion in Jinadu, "Ethnic Conflict and Federalism in Nigeria," pp. 35–37.

[73] 1999 Constitution of Nigeria, as amended, art. 41(1).

[74] Ibid., art. 42(1).

[75] Ibid., arts. 15(3)(a), 15(3)(b). Unlike the preceding sections, these affirmations and the one following are merely Directive Principles of State Policy.

[76] Ibid., art. 14(4).

[77] It certainly has not helped that, to avert another state-level armed secession similar to Biafra's, the Nigerian government abolished state police forces in favor of a single national force. This action created a large vacuum in state law enforcement, which has been filled by poorly trained auxiliary forces and often-misbehaved vigilante forces organized by state governments or by various private parties with a periodic need to employ violence for their own ends. See Hilary Matfess, "Institutionalizing Instability: The Constitutional Roots of Insecurity in Nigeria's Fourth Republic," *Stability*, Vol. 5, no. 1 (2016), art. 13.

[78] Brandon Kendhammer, "Citizenship, Federalism and Powersharing: Nigeria's Federal Character and the Challenges of Institutional Design," *Ethnopolitics*, Vol. 13, no. 4 (September 2014), pp. 396–417.

power can make for furious contests to control a local area. Civil service officials follow these discriminatory determinations in hiring. So routinized is the local discrimination that non-indigenes are often treated badly or denied service altogether when they have official business at government offices.

As in the case of Telangana in India before the division into two states, certificates of indigenous status are issued. In Telangana, there was a brisk trade in false *mulki* certificates, attesting to indigenous status, because so many opportunities turned on their possession. In Nigeria, the inability to be identified with the state and locality of one's birth, together with the array of preferences for indigenes, has proved to be a source of great conflict and an important impediment to geographic mobility that fragments a large labor market, presumably with high economic costs, and violates the guarantee of nationwide equality. In fact, all such claims to priority by birth fragment what might otherwise be indivisible markets for both labor and capital.[79]

To be sure, the preference programs are not all uniform. In some Nigerian states, women from outside are accorded the status of their indigenous husbands and are eligible for appointment to state government positions, and in others non-indigenes may stand in state elections. But these are exceptions to a general pattern of exclusion.

Malaysia certainly has had problems of both ethnic and religious discrimination, but much of what is experienced as discrimination by the large Chinese and Indian minorities is sanctioned by the exceptionally wide affirmative action policies adopted under the constitutional clause authorizing preferences in a variety of fields, public and private, for Malays and other Bumiputera (non-Malay "natives" of the two Borneo states).[80] These preferences for indigenes, established at the federal level, are generally replicated in the states, but there is nothing—or, at any rate, very little—that is distinctive about the way in which these preferences are experienced by minorities encapsulated within those states.

The one area of authority devolved by the constitution to the states in which there has been serious state-level discrimination concerns the Islamic religion. On this, however, there is no legitimating provision in the Malaysian constitution, which was intended to provide strong protection for religious freedom. It declares that Islam is "the religion of the Federation; but other

[79] As I mentioned earlier, some Burmese-minority leaders have contemplated the desirability of closing the borders of states they control to ethnic outsiders, on grounds of cultural preservation, upon reaching a future agreement on federalism with the Myanmar government. The effects on development would likely be considerable.

[80] 1957 Constitution of Malaysia, as amended, art. 153.

religions may be practiced in peace and harmony in any part of the Federation."[81] Another article provides that "Every person has the right to profess and practice his religion" and that every religious group has "the right to manage its own affairs, maintain institutions for religious and charitable purposes, and acquire and hold property ...."[82] As we shall see in detail later, despite the clause declaring Islam to be the religion of the Federation, the clearly expressed intention was to establish a secular state, with very wide scope for freedom of religion.

For some decades, these freedoms were freely practiced. With the worldwide Islamic revival in the 1980s, however, and as support for the ruling coalition declined among Chinese and Indians, both overwhelmingly non-Muslims—and as party competition for Malay-Muslim votes increased—religion became an issue on which votes might turn.[83] The constitution relegates the regulation of Islamic personal law to the states,[84] and a 1988 amendment to the constitution, article 121(1A), provides that the civil High Court and inferior courts have "no jurisdiction in respect of any matter within the jurisdiction of the [state-level] Syariah [Shariah] courts."[85] The upshot of these provisions is that many issues of Islamic practice were considered to be matters of state Islamic law, especially in family disputes, thereby raising questions concerning the conformity of state law with federal rights to freedom of religion and to non-discrimination on grounds of religion.

It might be thought that these issues were of concern only to Muslims, but many of them impinged severely on the rights of those who wished to convert out of Islam and on the rights of non-Muslim spouses and children of Muslims. Moreover, state Islamic authorities, sometimes supported by a federal department for the advancement of the Islamic religion, began to impose restrictions on churches and church publications, raising serious questions of discrimination and creating an atmosphere of second-class citizenship for non-Muslims. For a long time, and especially in the decade from, roughly, 2008 to 2018, article 121(1A) seemed to create a barrier to resolution of these questions, because of the independence of state Syariah courts and administrative bodies in Islamic religious matters. We shall consider later

[81] Ibid., art. 3(1).

[82] Ibid., art. 11(1), (3). The only qualification is the power accorded to state and federal governments to forbid proselytization of Muslims by other faiths. Ibid., art. 11(4).

[83] The decline in Chinese and Indian support was initially the result of ethnic, rather than religious, discrimination.

[84] 1957 Constitution of Malaysia, as amended, art. 74; Ninth Schedule, List 2, item 1.

[85] Ibid., art. 121(1A). Syariah courts are those adjudicating issues of Islamic law under the limited jurisdiction, both civil and criminal, afforded them by the constitution.

how the Malaysian courts have dealt with such questions, and we shall be more specific on the nature of discriminatory injuries.

Kenya's devolution dates only to the constitution of 2010, but its origins, too, go back to the colonial period and the establishment of "native reserves," but more directly to the demand, around the time of independence, for *majimbo* (Swahili for regions or provinces, implying regional government) by smaller ethnic groups that feared the likelihood that larger groups would dominate the central government, as indeed they have. An early regional dispensation was, in short order, abolished by the first post-independence president, Jomo Kenyatta, who also abolished Kenya's early multiparty democracy.

The idea of *majimbo* was revived with the restoration of multiparty contestation in the early 1990s. Debate on it intensified at the time of the 2007 elections, when it was espoused by the Orange Democratic Movement (ODM) of Raila Odinga, who was the ODM candidate for president at the time. The proposal was to bring regional government to the local constituency level, with the unstated implication that outsiders might need to leave.[86] Devolution to newly created regions became an important part of the agreement reached by former political adversaries at the time a new constitution was finally adopted in 2010 after the failure of an earlier draft in a referendum in 2005.

The 2010 constitution establishes a regime of 47 county governments that courts have declared enjoy equal constitutional standing to that of the central government.[87] This is a quasi-federal form of regional autonomy. The county governments are empowered to deal with agriculture, animal husbandry, fisheries, health, pollution, cultural activities, and pre-primary education, among other matters.[88] Among the stated goals of the devolution were to "protect and promote the rights and interests of minorities" and recognize the "rights of communities to manage their own affairs."[89] And it is exactly on these points—the identification of communities and the rights of minorities—that contention begins.

As in Nigeria, certain groups in devolved units—some of them local majority, some minority—regard themselves as the indigenous "communities" that are entitled to manage county affairs, to the exclusion of others. Attachment to particular parts of the land is common in Kenya, and conflicts

[86] Gabrielle Lynch, "Majimboism in Kenya's Moral Economy of Ethnic Territoriality," in B. J. Berman et al., *Moral Economies of Ethnic and Territorial Claims* (London: Routledge, 2016), pp. 49–69, at p. 61.

[87] Institute of Social Accountability v. National Assembly, (2015) eKLR (High Court), further proceedings at [2021] eKLR (Sup. Ct.).

[88] See 2010 Constitution of Kenya, as amended, chap. 11 and Fourth Schedule.

[89] Ibid., art. 174d, 174e.

have resulted from widespread migration and settlement that challenge the exclusive domain of those who claim to be indigenous to an area. Claims to indigenous status have also been inadvertently encouraged by international law recognition of certain preferences to be accorded to "indigenous peoples."[90] If there is a supply of new rights, there will be a demand for them. The Kenyan constitution, unlike the Nigerian, does not privilege indigenous status as a source of priority at any level of government. Nevertheless, preexisting conceptions of who belongs in a bounded territory can be a socially legitimizing force, if not a lawful one, for their proponents.[91]

Overall, the possibility of making demands based on indigeneity has exacerbated conflict between ethnic groups and even between subgroups of the same group as the possibility of claiming to have arrived in an area before others is recognized.[92] Across Kenya, the consequences have sometimes been serious. In Mt. Elgon in the West, Sabaot, a subgroup of the Kalenjin, have long asserted claims to be associated with the land and to regard others as "second-class citizens who should not enjoy equal access to local resources or elected office, or be able to determine political outcomes, or even be able to enjoy local residence."[93] In the 1990s, and not for the first time, Sabaot attacked Luhya residents of the area, in order to drive them out. In 1994, Sabaot were awarded their own district, whereupon one subgroup of the Sabaot, asserting a superior claim, came into conflict with another.[94] Likewise, in the Nandi Hills of the Southwest, also in the 1990s, Nandi, another Kalenjin subgroup, who claim ownership of the area, and other Kalenjin conducted violent expulsions of strangers living there.[95]

Similar claims are made by Mijikenda along the coast, to the exclusion of local Arabs, Asians, and Swahili people, who, they contend, have dispossessed them.[96] And in the volatile Rift Valley, two different groups, Maasai and Kalenjin, nurse grievances about their loss of preeminent attachment to the land to settlers, mainly from the numerous Kikuyu group, who have

[90] See United Nations Declaration on the Rights of Indigenous Peoples, 2007.
[91] Gabrielle Lynch, "Kenya's New Indigenes: Negotiating Local Identities in a Global Context," *Nations and Nationalism*, Vol. 17, no. 1 (2011), pp. 148–67.
[92] Ibid., p. 162.
[93] Gabrielle Lynch, "The Wars of Who Belongs Where: The Unstable Politics of Autochthony on Kenya's Mt. Elgon," *Ethnopolitics*, Vol. 10, nos. 3–4 (2011), pp. 391–410, at p. 393.
[94] Ibid., pp. 400–01.
[95] Lynch, "Majimboism in Kenya's Moral Economy of Ethnic Territoriality," pp. 56–57.
[96] Justin Willis and Ngala Chome, "Marginalization and Political Participation on the Kenya Coast: The 2013 Elections," *Journal of Eastern African Studies*, Vol. 8, no. 1 (2014), pp. 115–34.

become a majority in some parts of that fertile territory.[97] The resulting violence in the Rift Valley at the time of the disputed 2007 national election led to more than 1,000 deaths and an extraordinary number of displaced families that all estimates agree was in excess of 300,000, perhaps far in excess of that number.

Group conflict at the local level thus antedated devolution, but the creation of county-level governments, with their considerable powers and patronage, provided a new arena and a new rationale for it: securing control of the territory and its governmental apparatus. Devolution generally accelerated the sense of ethnic priority, because county lines were drawn rather close to former colonial district lines, many of which had some ethnic basis.[98] The idea that small groups at the national level might be able to exercise power at the local level was appealing to the designers of the system, but it gave rise to the notion that such groups, claiming ownership of the devolved area as a homeland, might be able to exercise authority over those they considered outsiders and might even be able to evict them.[99]

Although county lines took ethnicity into account, they certainly could not exclude heterogeneity in a country with as much internal migration as Kenya has experienced over many decades. Large ethnic groups are generally divided among several counties, and the five largest, with a bit less than two thirds of the population, tend to control, in the aggregate, about three quarters of the seats in county assemblies. Yet there is a sense in which small- and medium-sized groups have a chance at exercising local power that is denied to them at the national level.[100] Many counties have an ethnic-majority population, but only 16 groups (including 5 rather small groups) are in that fortunate category, whereas 27 groups are in the minority in 1 or more counties.[101] So, from the standpoint of accommodating minorities that cannot exercise influence at the national level, there has been some success. Even so, many counties do not have a majority population consisting of a single group, and some are quite heterogeneous.

[97] Lynch, "Majimboism in Kenya's Moral Economy of Ethnic Territoriality," pp. 49–50.

[98] See Harrison Mbori, "Devolution as a Panacea to Deeply Divided Multi-Ethnic (National) States: The Continuing Kenyan Experiment," *Strathmore Law Journal*, Vol. 5, no. 1 (2021), pp. 85–113; Ben Christopher Nyabira and Zemelak Ayitenew Ayele, "The State of Political Inclusion of Ethnic Communities under Kenya's Devolved System," *Law, Democracy, and Development*, Vol. 20, no. 1 (2016), pp. 131–53.

[99] Lynch, "Majimboism in Kenya's Moral Economy of Ethnic Territoriality," p. 50.

[100] Among the small groups that constitute a majority in a county assembly are the Taita, Pokot, Orma, Turkana, and Mijikenda.

[101] For these figures, see Nyabira and Ayele, "The State of Political Inclusion of Ethnic Communities under Kenya's Devolved System."

The 2010 Kenyan constitution tied "community land rights" to "ethnicity, culture or similar community of interests" and allowed land to be transferred "by any lawful process" to such communities,[102] giving a fillip to exclusive collective claims. County majorities tend to claim homeland status and demand recognition of ancestral land rights, to the exclusion of titles claimed by minorities. Many such disputes linger without resolution.[103] Worse, titles tend to be distributed by central authorities with an eye to national elections, so that the largest group, Kikuyu, have been issued more title deeds than have others.[104]

Kenya's constitution, like Nigeria's, declares that every person is equal before the law, and it provides that neither the state nor private persons shall "discriminate directly or indirectly against any person on any ground, including … ethnic or social origin …."[105] The problem, of course, is that it has created ambiguity by the way it embraced regionalization as a method of compensating smaller groups with ties to particular territories by granting them power at the county level, which they, like larger groups, can then take to extremes of exclusion if they can muster a county-level majority or if they are able to resort to violence, often but not always related to claims of indigenousness in the devolved unit.

County-level violence has declined somewhat in Kenya since devolution.[106] Still, it has been recurrent in areas such as Marsabit in the far North, Isiolo in the center, Mandera in the far Northeast, Tana River in the East, and along the coast. Some of the most extreme violence, in the Rift Valley, has been connected to national election results that had important local reverberations over land and other matters. Before the 2017 election, measures were agreed in Nakuru county between Kikuyu and Kalenjin that prevented post-election violence. The winning presidential candidate was Kikuyu, and his running mate was Kalenjin, which facilitated peace-making in that Rift Valley county. The two eventually fell out, and their split made the maintenance of peace in that troubled county problematic, but somehow peace was maintained, even though the Kalenjin vice-president defeated the Kikuyu candidate for president in the 2022 election.

[102] 2010 Constitution of Kenya, art. 63(1), (2).

[103] See Michelle D'Arcy and Marina Nistotskaya, "Intensified Local Grievances, Enduring National Control: The Politics of Land in the 2017 Kenyan Elections," *Journal of Eastern African Studies*, Vol. 13, no. 2 (2019), pp. 294–312.

[104] Ibid.

[105] 2010 Constitution of Kenya, as amended, art. 27(1), (4), (5).

[106] See Emma Elfversson, "Patterns and Drivers of Communal Conflict," in Steven Ratuva, ed., *The Palgrave Handbook of Ethnicity* (Singapore: Palgrave, 2019), pp. 675–93, at p. 678, table 1.

When violence occurs, it can have extreme effects. Pastoral Marsabit County is vast in area but sparse in population and impoverished by its arid environment. It has a plurality group, the Borana, and a significant number of smaller groups. After devolution, it had a resurgence of violence. Several non-Borana groups formed a coalition around a candidate for governor from the Gabbra group. Borana were divided among themselves, and the Gabbra candidate won the 2013 election. A year later, there were deadly clashes between Gabbra and Borana, with 72,000 people displaced. The Gabbra governor had erred in favoring his own group and subgroup after the election, triggering the dissolution of his coalition and the formation of new alignments, leading to his defeat in 2017, which had also been preceded by violence.[107]

In many Kenyan counties, there is some prospect of multiethnic coalitions and alternation in office. In a significant minority of counties, no national party can muster a majority in the county assembly. But in counties with clearcut majorities and minorities, there is more polarization and more violence. There was a mixed ticket of governor and deputy governor from the two largest groups in conflict-prone Isiolo county that made peace possible for a time,[108] but disputes among herders over pasturage and land ownership, intermixed with ethnic political competition and cattle theft, have continued to make the county a violent area.[109] So frequent have these disputes become that early warning systems have been devised in Isiolo and Marsabit to head off planned violence.[110]

Power sharing at the county level in Kenya is at an early stage. Whether it can be adopted widely to reduce discrimination and violent behavior is very much in doubt, as it is in Nigeria. Lacking any official preference for indigeneity, Kenya should have greater capacity than Nigeria to limit conflict and rectify discrimination, but so far its ability to do that seems limited. We shall see later, in litigated cases, that local oligarchies of two or three groups seem sometimes to have formed to exclude others and monopolize opportunities in a council. So far, the record is spotty. Inclusive deals seem rare and not generally durable.

There are checks upon the central government made possible by devolved government. Electoral results at the national and county levels may vary. The

[107] See the fine unpublished paper by Karol Czuba, "Ethnic Politics in Marsabit," Sewanee University of the South, Sewanee, Tennessee, September 2018, from which this account is drawn.

[108] Dominic Burbidge, "Emerging Diversity in Security Practices in Kenya's Devolved Constitution," *Conflict Trends*, Vol. 2017, no. 1 (2017), pp. 34–42, at pp. 40–41.

[109] See, e.g., *Daily Nation* (Nairobi), June 23, 2021.

[110] Billy Rwothungeyo, "A Model for Peace in Northern Kenya," Minority Rights Group, London, October 11, 2022, which makes clear how damaging are the secondary effects of these violent episodes—for example, on low rates of school attendance and incentives for educated people to leave violent counties.

party that controls the presidency or the legislature at the center may not control the majority of county councils. In many councils, no party has a majority of seats, and many governors are members of locally influential but relatively small groups poorly represented at the center. Some seem adept at organizing against the center.[111] Whether local political accommodation and the possibility of alternation in office can supplant violent behavior in Kenya is very much in question,[112] just as it is in Nigeria and in Northeast India, in both of which claims to indigenousness command a high degree of governmental approval or at least acquiescence.

What stands out in Kenya, as in a number of other schemes of federal and regional autonomy devolution, is the propensity for blatant forms of ethnic discrimination, especially severe when accompanied by claims of priority based on indigenousness. Anyone who is discontented with a devolved unit should be able to migrate to another unit. Unfortunately, migration becomes far less feasible for members of groups lacking their own devolved units once local indigeneity becomes, *de facto*, the governing principle of unit organization and there is no recourse for those disadvantaged by the principle. Early on, the implementation of anti-discrimination law was described in Kenya as "patchy and inconsistent."[113] Until this problem is redressed, there and elsewhere, the final balance of benefits and costs of devolution to areas in which son-of-the-soil or local majoritarian sentiments are strong will remain uncertain.[114]

Proliferation of Units

In recent decades, there has been a prodigious creation of new federal states and new regional units within states in Northeast India in response to ethnic-group and subgroup claims to new governmental units they can control. More demands for micro-partitioning have followed the creation of new units in Assam. Discontented groups in Ethiopia have made similar demands,

[111] Lynch, "Majimboism in Kenya's Moral Economy of Ethnic Territoriality," p. 64. For the complexity of national and regional alignments and the persistence of local conflict, see Nic Cheeseman, Gabrielle Lynch, and Justin Willis, "Decentralization in Kenya: The Governance of Governors," *Journal of Modern African Studies*, Vol. 54, no. 1 (2016), pp. 1–35.

[112] For sources of violence and their connections to devolution, see Jeremy Lind, "Devolution, Shifting Centre-Periphery Relations and Conflict in Northern Kenya," *Political Geography*, Vol. 63 (2018), pp. 135–47; Caitriona Dowd and Jean-Pierre Tranchant, "Decentralisation, Devolution, and Dynamics of Violence in Africa," Institute of Development Studies Working Paper no. 511, Falmer, Sussex, 2018.

[113] Equal Rights Trust (in partnership with the Kenya Human Rights Commission), "In the Spirit of Harambee: Addressing Discrimination and Inequality in Kenya," ERT Country Report Series, no. 1, London, 2012, p. x.

[114] We shall return to problems of anti-discrimination law in later chapters.

but with less success. One of the hazards of devolution is that it is not always easy to stop at a pre-set number of devolved units. Pre-commitment to a limited number of units might be an effective deterrent to proliferation in federal systems but is less likely to have that effect in regimes of regional autonomy.

Claims of indigenousness constitute a great incentive for groups to seek their own new states. In such cases, possession of a state is obviously the key to monopolizing resources and opportunities. In Nigeria, it has also been the path to patronage from a cabinet minister from the new state who must be appointed once it is created. In addition, a new university has customarily been established in each new state. And there are reciprocal benefits for politicians at the center. The Nigerian military rulers who enlarged the number of states in the decade from 1987 to 1996, from 19 to 21, then to 30, and finally to 36, were able to solidify their support base with locally influential leaders who benefited from guaranteed revenue allocations for each state.[115] As in India and as we shall see in Indonesia, the creation of new regional authorities is connected to politicians at the center, who gain or maintain a clientele and its following.

For those who find themselves excluded from full participation in a devolved unit because they form a minority, or because others claim indigenous status, or both, it is tempting to demand their own state. In 2012, there were 57 demands for new states in Nigeria,[116] generally from groups that feel neglected by state governments or groups that experience ethnic discrimination. These demands were futile. The central government had managed to halt the creation of new states after it split off the last six in 1996. Similar demands for new LGAs are, of course, more easily accommodated. As mentioned, there are currently 774 of these. Martin Dent comments that because of the "vigorous and continuous campaign" for new units, "Nigeria could almost be compared to a biological cell which sub-divides and sub-divides again, creating more and more replicas of itself."[117] Some of the newer states and LGAs have few human or capital resources and weak capacity to generate revenue, requiring revision of central revenue allocation formulae for subsidies.[118]

Similar phenomena are found in Indonesia, where proliferation of regions has been prodigious. Within a decade and a half of the inception of regional

[115] Kendhammer, "Getting Our Piece of the National Cake," pp. 154–58.
[116] Adewale Stephen Adeniyi, "Quest for States' Creation in Nigeria: A Harbinger of Development or Underdevelopment?" *Journal of Culture, Society, and Development*, Vol. 4, no. 1 (2014), pp. 68–71, at p. 68.
[117] Dent, "Ethnicity and Territorial Politics in Nigeria," p. 129.
[118] Jinadu, "Ethnic Conflict and Federalism in Nigeria," p. 31.

autonomy, Indonesia increased the number of autonomous regions, including regencies and cities, by nearly 50 percent, ultimately to 514 as of 2019. One motive for groups to demand division of a region is to monopolize a resource located in one portion of it and exclude the other part of the territory from its benefits; another is simply to create more government jobs.[119] In other cases, the motive is to achieve greater ethnic homogeneity or to escape from local ethnic domination. The possibility of creating new regions in ethnically mixed areas frequently produces a race to claim indigenous status in an area, sometimes accompanied by violence against opposing groups.[120]

Not infrequently, the creation of new regions has been a method of separating violent antagonists, so the initial demand is usually buttressed by violence.[121] The reluctance of central governments to create new units has the common effect of producing incentives for violence to force the hand of authorities in the capital. As in Northeast India, new subdistricts are also created in Indonesia to separate groups. In some areas, such as Poso, a previously violent part of Sulawesi, the separation of groups into separate districts reduced minority resentment and the accompanying violence.[122]

Two studies of the creation of new districts in Indonesia conclude that new districts were more likely to be created out of preexisting districts that were ethnically heterogeneous. Many had been locations of violence. Both studies find the new districts that emerged from the process were more likely to be ethnically homogeneous than the former districts were.[123] Unsurprisingly, ethnic differences between two areas of an undivided district were also associated with propensities to divide a district. Because new districts require parliamentary approval, an additional condition in accounting for division of districts was a connection to one of the two largest parties at the national level, as measured by their vote share in the districts to be split.[124] So, connections of local politicians to influential national-level politicians have made district fission more likely, just as they have done in Nigeria and India. And, finally, the likelihood of ethnic violence in the new district was found to decline.[125] Of course, this finding is consistent with the possibility that local

[119] Risa Toha, *Rioting for Representation: Local Ethnic Mobilization in Developing Countries* (Cambridge: Cambridge University Press, 2021), p. 209.

[120] Horowitz, *Constitutional Change and Democracy in Indonesia*, p. 128, and sources cited there.

[121] Diprose, "Passing on the Challenges or Prescribing Better Management of Diversity?" pp. 411–19.

[122] Ibid., pp. 411–12.

[123] Toha, *Rioting for Representation*, pp. 216, 219, 224–28; Jan H. Pierskalla, "Splitting the Difference: The Politics of District Creation in Indonesia," *Comparative Politics*, Vol. 48, no. 2 (2016), pp. 249–68.

[124] Pierskalla, "Splitting the Difference."

[125] Ibid. Variables indicative of economic or administrative rationales for dividing regions—such as efficiency of goods provision, revenue per capita, or income inequality—proved at best to be weakly associated with splits, or not at all, or associated with a sign in a direction opposite to the one predicted.

politicians were incentivized to produce violence in order to facilitate central government action for district proliferation.

In many ethnically divided societies, devolution to heterogeneous areas creates conflict over control and demands for further devolution.[126] Every policy to recognize an ethnic status quo creates a set of incentives to enhance the status quo and, by so doing, to alter it. For example, North Macedonia's decentralization gave a measure of autonomy to towns with 20 percent or more minority population, which, naturally enough, generated demands to reconfigure local boundaries to maximize the number of locations that met the 20 percent threshold. In the end, 40 municipalities in North Macedonia experienced changes of boundaries.[127] What began as an attempt to recognize preexisting population concentrations resulted in the creation of more areas with the required concentration to attain devolved authority. Uganda's decentralization was characterized by ethnically based rivalries over the election of district chairs and often violence after the elections, followed by demands for new districts from "those ethnic groups without their 'own' district ...."[128] From 1959 to 2006, the number of districts grew 5-fold, from 16 to 80. In many new districts, the altered ethnic configuration created new conflicts.

This is the same phenomenon that characterizes Indian federalism: the creation of new states that give rise to additional demands from subgroups or from groups that lost out in previous struggles. Where groups are not internally homogeneous, the award of a unit to the overarching group can give rise to demands from subgroups for additional unit fission. And the award of a new unit to a group or subgroup can also produce demonstration effects in other units. At any given moment, India is host to dozens of such demands.[129] Despite the administrative difficulties of creating a new unit, that course seems easier and usually more politically rewarding in cultivating support for officials at higher levels than is attending to the requirements for groups to accommodate each other in an existing unit.

If a general purpose of devolution is to protect against domination by an overweening or unresponsive central government, the paradoxical result of unit proliferation may be the defeat of this very purpose. Units may be free to deviate from central government rules, as we shall see momentarily, but they may lack the capacity to counter the center. A multiplicity of small units,

[126] See, e.g., Pierre Englebert and Nestorine Sangaré, "Burkina Faso: Limited Decentralization under Tight Oversight," in J. Tyler Dickovic and James S. Wunsch, eds., *Decentralization in Africa: The Paradox of State Strength* (Boulder: Lynne Rienner, 2014), pp. 45–68, at p. 64.

[127] Hristova, "Decentralization and Types of Inter-Ethnic Cooperation."

[128] Green, "Decentralization and Conflict in Uganda," p. 443.

[129] See Bhaumik, "Ethnicity, Ideology and Religion."

particularly those that are fiscally challenged, implies heavy dependence on good relations with the capital. As Levy has said, "Provinces that are large enough, stable enough, and aligned with cleavages of sentiment and loyalty can usefully counterbalance the central state. Localities without those traits cannot."[130] The latter will likely encounter collective action problems in securing allies against the center, especially if they are ethnically differentiated, and their dependence on the center will impair their ability to threaten it on their own.

The proliferation of units typically creates new problems. The possibility of economically unviable units in need of central government subventions grows, and administrative capability is spread more thinly. More important for present purposes, it becomes difficult for central governments to monitor hundreds of units, to detect unlawful activity, and to enforce minority protections when the number of groups that are victimized expands, even as their group size per unit contracts.

There may be no generally applicable solution to the proliferation problem, but units based on preexisting administrative or traditional territorial boundaries may have more sticking power than those that had few functions or were created afresh with devolution. Autonomy in Kenya was conferred on 47 county governments, most of which followed the boundaries of well-established districts. While these have had their share of problems, proliferation of units has not been among them.

Ultra Vires Actions

Devolved units can issue regulations and orders in excess of their legitimate powers, as regions can become fiefdoms under the control of leaders acting in the name of majorities or of groups designated as indigenes, whatever their share of the population. The case of a mayor in the West Java town of Bogor, who refused for many years to comply with an Indonesian Supreme Court order to reopen a church illegally closed simply because it was a Christian institution, is illustrative, if extreme. Where there are many devolved units, some will probably be run by local strongmen beyond the effective reach of the law.[131]

[130] Levy, "Federalism, Liberalism, and the Separation of Loyalties," p. 465.

[131] See Edward L. Gibson, "Boundary Control: Subnational Authoritarianism in Democratic Countries," *World Politics*, Vol. 58, no. 1 (October 2005), pp. 101–32.

The creation of large numbers of units is typically accompanied by some prominent externalities. In Indonesia, an additional layer of taxation and corruption was added, a matter also noted in Kenya, where bribery has become common at the county level, making it harder to do business; and in some counties, public funds have been looted.[132]

Unconstitutional actions are common in devolved units. Not long after adoption of the 1999 constitution, several northern Nigerian states adopted Shariah criminal punishments, which were occasionally applied to Christians as well as Muslims.[133] *Ultra vires* regulations concerning Shariah have been adopted by district authorities in Indonesia, to the distress of non-Muslims and less observant Muslims alike. Indonesian districts have no authority over religion, but this did not deter politicians who seek popularity by displaying their concern for Islamic observance. Quite a few districts enacted laws regulating female attire, prescribing Islamic dress on Fridays, outlawing certain forms of secular dress, imposing curfews on unmarried couples, forbidding gambling or the consumption of alcohol, or restricting the way women may sit on motorcycles.[134] Sometimes local authorities imposed such unlawful restrictions on non-Muslims as well. In this way, devolution made life harder for regional minorities. Also in excess of their authority have been laws imposing certain charges or forms of taxation.[135] Altogether, regional laws enacted without lawful authority number in the many thousands.[136]

Fully 443 Shariah regulations alone were imposed by local authorities in Indonesia between 1998 and 2013. Most of these were adopted in a small number of provinces with strong Islamist traditions antedating democratization, and two thirds were in rural areas. They were the product of locally active Islamist organizations that were able to put pressure on regional-level politicians in a highly competitive electoral environment that is largely unstructured by the presence of strong national party organizations at the regional level. Those regional politicians came almost entirely from non-Islamist parties, and they were responding opportunistically to demands from potential supporters with intense preferences, most often in their first

[132] Samuel Ngigi and Doreen Nekesa Busolo, "Devolution in Kenya: The Good, the Bad, and the Ugly," *Public Policy and Administration*, Vol. 9, no. 6 (2019), pp. 9–21.

[133] Rotimi Suberu, "Can Nigeria's New Democracy Survive?" *Current History*, Vol. 100, no. 646 (2001), pp. 207–12.

[134] See, e.g., *Jakarta Post*, December 20, 2017, September 15, 2015, May 1, 2013, and April 24, 2013.

[135] See Simon Butt, "Regional Autonomy and Legal Disorder: The Proliferation of Local Laws in Indonesia," *Singapore Journal of Legal Studies*, July 2010, pp. 1–21.

[136] Simon Butt, "The Indonesian Constitutional Court: Reconfiguring Decentralization for Better or Worse?" *Asian Journal of Comparative Law*, Vol. 14, no. 1 (2019), pp. 147–74.

terms in office, when they were building local bases.[137] Islamist groups were willing to "peddle political resources to state elites competing for local government head posts."[138] In such regions, dissident Islamic sects (especially Ahmadiyah, which claims to follow a prophet who appeared in the nineteenth century[139]) are declared to be unlawful; and many Christian churches have been denied building permits, unable to build if they had permits, or burned down by vigilantes if they had already been built.[140]

The result of this local Islamism was a very high level of support among Islamist Indonesians, especially the most fervent, for devolved regional government in a country in which Islamism had been largely marginalized in national-level politics, where religious injunctions and restrictions that are offensive to minorities could not readily be enacted.[141] Authoritarian compartments are an attractive alternative.

Certain national institutions were, however, involved in countenancing *ultra vires* Shariah regulations at the regional level. Majelis Ulama Indonesia (MUI), the Indonesian Council of Ulama (Islamic scholars), issued fatwas (decrees) and statements of approval of local religious regulations in the early period of devolution. MUI was generally intolerant of religious minorities, and its decrees furnished an excuse for attacking them.[142] Ahmadis, who, as I have noted, believe, contrary to mainstream Islam, that the founder of their sect was the last prophet, have been targets of hundreds of attacks. In addition to MUI, some government bodies have collaborated in restricting religious freedom, especially concerning "deviancy" from orthodox versions of Islam.[143]

In the first decade or more after devolution was implemented, the Indonesian Home Ministry, which had jurisdiction over devolved authorities through its Directorate General of Regional Autonomy, was not willing or was not able to react promptly or adequately to many *ultra vires* actions that

[137] See Michael Buehler, *The Politics of Shari'a Law: Islamist Activists and the State* in *Democratizing Indonesia* (Cambridge: Cambridge University Press, 2016).

[138] Ibid., p. 158.

[139] For this reason, orthodox Muslims regard Ahmadiyah as a heretical sect.

[140] The number of churches destroyed is very high (in the hundreds), but again disproportionately in a few provinces with Islamist backgrounds and large Muslim majorities, such as West Java. For details, see Melissa Crouch, "Implementing the Regulation on Places of Worship in Indonesia: New Problems, Local Politics and Court Action," *Asian Studies Review*, Vol. 34, no. 4 (2010), pp. 403–19.

[141] Diego Fossati, "When Conservatives Support Decentralization: The Case of Political Islam in Indonesia," *Regional and Federal Studies*, 2021, https://doi.org/10.1080/13597566.2021.1951252.

[142] Arskal Salim, "Muslim Politics in Indonesia's Democratization," in Ross McLeod and Andrew MacIntyre, eds., *Indonesia: Democracy and the Promise of Good Governance* (Singapore: Institute of Southeast Asian Studies, 2007), pp. 115–37, at pp. 131–32.

[143] See Melissa Crouch, "Indonesia, Militant Islam and Ahmadiyah: Origins and Implications," ARC Federation Fellowship, Islam, Syari'ah and Governance Background Paper Series, no. 4, University of Melbourne Law School Centre for Islamic Law and Society, 2010.

were seen locally as popular and correct.[144] Sometimes, these Home Ministry omissions reflected the reticence of responsible authorities about thrusting themselves into conflicts that could make them centers of controversy and could well produce a backlash against them. Sometimes, it proved hard to keep track of what so many regional governments were doing. When there is a profusion of regions, acquiring accurate local information and reviewing regional actions for lawfulness becomes much more difficult.

By statute enacted in 2014, the Indonesian Home Ministry was empowered to review laws enacted at the provincial level, and provincial governors were given authority to review and, if necessary, cancel those enacted at the regional level; but the ministry was also awarded residual authority to review and cancel regional laws that were not vetoed by the governor.[145] The statute explicitly declared the need for devolved authorities to foster "harmony among ethnic, tribal, religious, racial and other groups,"[146] and grounds for canceling such laws included their tendency to disrupt "peace and harmony among groups, or disrupt public order, or produce discrimination."[147] The law made it quite clear that policies not guided by norms, standards, and criteria established by the central government would be subject to cancelation.[148] This was an obvious attempt to clamp down on *ultra vires* regional legislation, and two years later the ministry invalidated more than 3,000 such regional laws, most of them for imposing unlawful taxes. As we shall observe, however, the ministry was thwarted in its efforts to compel regions to observe the law by a Constitutional Court decision.

Legal and administrative competence is often inadequate in devolved regions in many countries. Policing is a central government function in Kenya, but county governments often sense a need to supplement the inadequate police presence at the local level, especially in the light of previous episodes of ethnic violence or criminality. In 2011, notwithstanding the constitutional apportionment of the police function to the central government a year earlier, the Kenya parliament passed a National Police Service Act, which recognized the need for county-level policing to compensate for shortfalls in national police presence at the county level. Some Kenyan counties have appointed poorly trained *askaris*, meaning "soldiers" but in this case police officers, to enforce county law. The predictable result is a degree of

[144] Horowitz, *Constitutional Change and Democracy in Indonesia*, pp. 131–34.
[145] Law no. 23 of 2014 on Regional Government, art. 251.
[146] Ibid., art. 25(1)(c).
[147] Ibid., art. 250.
[148] Ibid., art. 17(3).

official arbitrariness. More developed Kenyan counties have established local police forces and trained them more completely.[149]

The proliferation of units usually means the creation of units of varying capacities—and varying degrees of remoteness from the center—with the accompanying chance for illiberal practices to take hold. In polities severely divided by ethnic affiliation, discrimination is the most common risk, but the danger of subnational authoritarian practices for pecuniary gain or continuation in office to become embedded in poorly monitored or poorly controlled regions is also considerable. Unit proliferation is likely to increase the extent and frequency of illiberal practices at devolved levels of the polity. Some of these practices fall below the threshold of easy recognition and so are hard to remedy.

This is especially the case for practices that do not take a formal shape, such as published regulations. They can just as easily consist of uneven enforcement of norms or the entrenchment of power holders who do not follow specified rules or observe the limits of their formal legal competence.[150] Devolved polities, whether federal or not, often exhibit large variations from unit to unit, even in established democracies. Regional authoritarians may derive assistance from national-level allies in maintaining their grip on power and permitting official behavior that deviates from established national norms.[151] Although purporting to follow rules laid down by the central government, local actors may resist them in practice by applying them differently. With an abundance of units, appropriate supervision from the center becomes difficult, especially if local oligarchies secure control of various regions.[152] Where ethnic or party differences are replicated at national and devolved levels, tolerance by the center of deviations by those regions that provide political support becomes a serious possibility.

Reneging and Recentralization

Infidelity to agreed norms of devolution is a bilateral problem. Governing authorities in devolved units are not alone in indulging their preference for reneging behavior. Central governments may renege as well, and we

[149] Leonard Mwakuni, *Constitutional and Legal Framework for the Enforcement of County Laws in Kenya: Challenges and Proposals* (Munich: GRIN Verlag, 2018).

[150] See the fine treatment of this subject by Jacqueline Behrend and Laurence Whitehead, "Setting the Comparative Agenda: Territorially Uneven Democratization Processes in Large Federations," in Behrend and Whitehead, eds., *Illiberal Practices: Territorial Variance within Large Federal Democracies* (Baltimore: Johns Hopkins University Press, 2016), pp. 1–19.

[151] For an example from Machakos County in Kenya, see Burbidge, "Emerging Diversity in Security Practices in Kenya's Devolved Constitution," p. 40.

[152] A point made by Behrend and Whitehead in "Setting the Comparative Agenda."

have seen that withdrawal of devolved arrangements can be conducive to secessionism.

"Federal feeling," a sense of respect for mutually valued autonomy that was once said to provide a sturdy foundation for devolved regimes, may not be the prevalent sentiment in most such regimes. Federalism is an acquired taste: it does not come naturally to many politicians, unless they share a history of uniting disparate territories against some external threat, as in Switzerland's case. Those who come to federalism or regional autonomy reluctantly and not out of free choice may not embrace it wholeheartedly and decide later to limit its purview. Recentralization seems more likely to occur when devolution has an external source than when it has been voluntarily agreed.

That applies especially to colonially inherited federal regimes, as in Nigeria, where, after its first coup in January 1966, the new military ruler sought—unsuccessfully—to abolish the regions, and in Malaysia, where the preexisting colonial federal inheritance was embraced by Malays in an extreme reaction to a British scheme in 1946 to unite the states of Malaya and simultaneously abolish the state sultans, who had become symbols of Malay hegemony and security, as we saw earlier. In both countries, federalism was accepted as the price of what was anxiously considered a matter of ethnic predominance, or even survival, by Hausa-Fulani and Malays, respectively. Acceptance of federalism or devolution in general, for that matter, did not imply enthusiasm.

In Nigeria, complete recentralization has not been possible, because state governors have managed to challenge excessive central authority by pursuing causes that might benefit their states, sometimes through litigation. Even so, the central government has 68 exclusive powers confided to it by the constitution. The center also retains control of important sources of authority, including oil revenues, an especially important matter to poorer states, which depend most heavily on central government generosity.[153]

The states of peninsular Malaysia, which achieved independence as the Federation of Malaya in 1957, have a very limited list of subjects within their purview, principally the personal law of Muslims, land and permits and licenses related to land, village and town government, and local services.[154] This is a list that befits a tightly centralized federation. Moreover, the central government has the sole power to tax, which renders the states dependent on the center for revenue. The center also has the ability to

[153] Suberu, "Federalism in Africa," pp. 78–79; Jinadu, "Ethnic Conflict and Federalism in Nigeria," pp. 30–31.

[154] 1957 Constitution of Malaysia, as amended, art. 74; 9th Schedule, list 2.

legislate, under some circumstances, even on matters ordinarily confided to the states.[155]

On the other hand, as I mentioned earlier, the Borneo states of Sabah and Sarawak were promised a different relationship with the center. Upon their separate independence from Britain, they merged with the Federation of Malaya to create Malaysia in 1963. Their willingness to merge was conditioned on their preservation of several very important powers, including certain powers over language policy, official religion, and immigration—including even migration from peninsular Malaya, hundreds of miles across the South China Sea. These powers were specified in an international treaty signed by the Federation of Malaya, the United Kingdom, Sabah, Sarawak, and Singapore.[156] They reflected different ethnic and religious demography in the Borneo states and different levels of economic development from those features in peninsular Malaysia. As a result of the agreement, several special provisions for the two Borneo states were added to the Malaysian constitution.[157]

I have already described the rather modest commitment of the central government to a federal regime with provisions that catered to the preferences of Sabah and Sarawak. Over time, the special status of the two new states was eroded by successive governments sitting in the capital. As early as 1976, the constitution was amended in such a way as to suggest a downgrade in their status to match that of the states of Malaya. The federal government kept a tight rein on politics in all the states, including those on Borneo.

Discontent in Sabah and Sarawak grew with the overbearing hand of the center, the erosion of the states' powers, and also the extremely modest 5 percent royalty paid to the states for their production of most of the oil and gas revenues Malaysia earned. The increasing, covert immigration of Filipino and Indonesian Muslims, tolerated and perhaps encouraged by some politicians in the central government, effected a change in the ethno-religious composition of Sabah and was deeply resented there. When an opposition coalition that had committed itself to a new federal–state relationship finally took power in Malaysia in 2018, it attempted to repeal the symbolic provision that had been altered in 1976, but the government lacked the majority needed to accomplish the repeal or in other ways to revise the relationship.[158]

[155] Ibid., art. 76.

[156] Agreement relating to Malaysia, no. 10760, signed in London, July 9, 1963; Agreement amending the above-mentioned Agreement, signed in Singapore, 28 August 1963, https://treaties.un.org. It will be recalled that Singapore was obliged to separate from Malaysia in 1965.

[157] 1957 Constitution of Malaysia, as amended, art. 161E; 9th Schedule, Lists 2A, 3A.

[158] For the grievances and the proposal, see Wilson Tay Tze Vern, "Restoring the Constitutional Status of Sabah and Sarawak: First Step in a Long Journey of Redemption," https://constitutionnet.org/news/

That government lost power in 2020, and the reforming zeal fell with it.[159] A new coalition government soon took power, however, and managed to pass a somewhat more extensive set of mainly palliative provisions a year later.[160]

The Malaysian federal and state party history bears on an important theme in the literature on party politics and devolution. It is often asserted that devolution can operate more effectively when the same party is in power at the national and the devolved levels.[161] The tendency to outlaw ethnic parties, as in Indonesia, Kenya, and Nigeria, makes the prospect of inter-level party congruence somewhat more likely. Even if one or another multiethnic party has a particular ethnic skew, as is common in a number of countries that forbid ethnically based party organization, the geographic reach of a multiethnic party within the whole country implies an increased chance that the same party may rule the central government and some or all of the devolved regions.

In Malaysia, where ethnic parties prevail, multiethnic coalitions are common at the federal and state level. The same coalition that ruled at the center for many decades was always determined to rule in the states, partly because its success in federal elections depended on its success in the states and partly because it aimed at uniform policy and patronage power across the states. With relatively few exceptions, it succeeded in doing so.

In addition to applying measures of dubious democratic legitimacy to insure conformity of Sabah and Sarawak to central government dictates, the central government coalition managed to punish or remove politicians in Sabah and Sarawak who did not toe the federal line. In fact, on three occasions it managed to remove chief ministers, one in Sarawak not long after the formation of Malaysia and two at later points in Sabah. It also removed federal ministers for excessively championing the interests of their Borneo states.[162] A favorable decision of the Privy Council in a case arising out of the

restoring-constitutional-status-sabah-and-sarawak-first-step-long-journey-redemption. The provision at issue was a list contained in article 1(2) of the 1963 Constitution of Malaysia.

[159] For an excellent inventory of strong central government powers and proposals to redress federal–state imbalances, see Tricia Yeoh, "Reviving the Spirit of Federalism," Kuala Lumpur, Institute for Democracy and Economic Affairs, Policy Ideas, no. 5, April 2019.

[160] Malaysian Constitution (Amendment) Act 2021. There was also, apparently, an unpublished agreement with the Borneo states that accompanied these very modest amendments. I am indebted to Dian A. H. Shah for calling my attention to this amending act.

[161] See, e.g., Bakke and Wibbels, "Diversity, Disparity, and Civil Conflict in Federal States," p. 34; Filippov, Ordeshook, and Shvetsova, *Designing Federalism*, pp. 182–92; R. Kent Weaver, "Electoral Rules and Party Systems in Federations," in Ugo M. Amoretti and Nancy Bermeo, eds., *Federalism and Territorial Cleavages* (Baltimore: Johns Hopkins University Press, 2004), pp. 227–58.

[162] For all these machinations, see Harold Crouch, *Government and Society in Malaysia* (Ithaca: Cornell University Press, 1996), pp. 51–95, 103; R. S. Milne, *Government and Politics in Malaysia* (Boston: Houghton Mifflin, 1967), pp. 82–86, 103, 145–46; Robert O. Tilman, "Mustapha's Sabah, 1968–1975: The Tun Steps Down," *Asian Survey*, Vol. 16, no. 6 (1976), pp. 495–509. On Sabah, see also Graham K.

dismissal of the Sarawak chief minister made it easy for the federal government to have its way.[163] Having achieved this success, it became the arbiter of internal party and coalition disputes, and it was able to control the futures of politicians who aspired to power in the states or hoped to be promoted to positions in the federal cabinet, either of which could be an advantageous move for a favored politician.

Undoubtedly, party correspondence at state and federal levels can contribute to a smoothly operating devolution dispensation, with power and information flowing in both directions. But perhaps not to the maintenance of fully democratic regimes. For authorities who aspire to rule the country with an iron hand from the center and to brook no opposition from devolved units, a very effective method is provided by that same symmetry of party (or coalition) identities at the central and the devolved levels.[164]

Demands from the center in Malaysia for conformity with its wishes allowed, as we have already observed, the radical downgrading of what had clearly been intended as an asymmetric federal relationship with the two Borneo states. To sustain devolved powers against recentralization requires an adequate supply of those powers and the ability of the devolved units to prevent their usurpation. Sabah and Sarawak were left with inadequate resources to defend their interests or even to compel formal observance of their assigned powers.[165] Authorities in the capital preferred symmetry, although they had previously agreed to asymmetry with respect to the two Borneo states.

Adding to the ability of the central authorities to renege on what had been agreed was the fact that the ruling coalition in Malaysia held a two-thirds majority in parliament during most of its long tenure in government. This enabled it to amend the constitution, without regard to the original intention to allow the Borneo states a veto over any amendments affecting their interests. In 1963, Sabah and Sarawak were to have one third of the seats in the lower house of parliament, which would essentially provide such a veto; they currently have only 25 percent, and their ruling parties or coalitions

Brown, "Federalism and Special Autonomy as Conflict-Resolution Methods: Comparative Perspectives from Southeast Asia," paper presented at the Oxford Centre for Research on Inequality, Human Security and Ethnicity conference on Federalism, Decentralisation, and Conflict, October 5–7, 2006.

[163] Stephen Kalong Ningkan v. Government of Malaysia, [1968] 2 MLJ 238.

[164] For an excellent example, see Francis Hutchinson, "Centre-State Relations and Intra-Party Dynamics in Malaysia: UMNO and the Case of Johor," *Asian Journal of Political Science*, Vol. 23, no. 2 (2015), pp. 111–33.

[165] For what was lost, see J. C. Fong, "Federal-State Relations: Sabah and Sarawak," [2019] 3 MLJ xxviii. On restoring some powers, see Andrew Harding, "Devolution of Powers in Sarawak: A Dynamic Process of Redesigning Territorial Governance in a Federal System," *Asian Journal of Comparative Law*, Vol. 12, no. 2 (2017), pp. 257–79.

are almost always aligned with the ruling federal coalition. Without legal constraints, even treaty obligations incurred as the price of forming a newly composed federation could be brushed aside. At best, one can say smooth functioning of a devolved regime can be aided by congruence of parties or coalitions ruling at the center with those governing the devolved units, but, absent thoroughly enforceable legal guarantees, such an arrangement is subject to the overweening ambition of whoever rules the center. Malaysia's federal–state interaction has been unusually sedate.

As we have just seen, the ability of the center to intervene in state matters and the dependence of states or regions on taxes collected by central governments are two strong indicators of centralization. India's federalism is heavily centralized, as it was intended to be,[166] and New Delhi has not hesitated to interfere in state government affairs when it has seen fit to do so, but state governments are hardly powerless. Kenya's counties are quite dependent on central government largess; 70 percent of all counties rely on the government in Nairobi for at least 90 percent of their revenue. In addition, the constitution gives central government officials the power to intervene in county affairs or to suspend a county government under certain circumstances.[167] Kenya's upper house has jurisdiction limited to county affairs,[168] but some senators have begun to act as intermediaries between the center and the counties. India and Kenya have centralized governments, but it would be hard to depict them as hyper-centralized.

Leaving aside asymmetric arrangements, few devolved governments possess quite the degree of autonomy afforded to Swiss cantons, Canadian provinces, Australian or American states, or Belgium's regions. Many latter-day constitutional framers and those who sit at the center are wary of delegating power generously downward. Their wariness or, in the case of federations inherited rather than created voluntarily, their lack of commitment tempts many to recentralization.

Iraq, for example, came to a robust federalism (at least on paper) after the second Iraq war in 2005, but did not wholly embrace it. Adoption of a federal constitution with the power to amalgamate governorates to create larger regions was the result of a deal between Kurdish politicians, who had long wanted freedom from Baghdad, and some Shia politicians, who wished to redress their deficient support in the oil center of Basra with hegemony that it was more plausible to achieve in a wider, amalgamated southern region. Given the Shia majority in the country as a whole, it did not take long for

[166] Thiruvengadam, *The Constitution of India*, pp. 83–84.
[167] 2010 Constitution of Kenya, as amended, arts. 190, 192.
[168] Ibid., art. 96.

a slight change of political fortunes for a new Shia prime minister to turn the regime in a unitarist direction.[169] A decisive indicator of lack of commitment is the failure to establish the upper house provided for in the 2005 constitution.

An indicator of lack of enthusiasm for anything resembling federalism in Indonesia is the exceptionally weak upper chamber, which has the power to propose and advise the lower house on various matters but no power to enact or veto anything.[170] As I explained previously, federalism had become the enduring f-word of Indonesian politics as a result of Dutch machinations, but devolution was considered, reluctantly by some, a necessary step to democratization in 1998. Commitments to regional autonomy have occasionally proved insecure. Lack of enthusiasm for party fragmentation and for regionally popular parties was made obvious by changing electoral requirements that essentially killed off two such parties with strong local followings, one of them identified with Christian causes, the other with a niche Islamic sensibility.[171]

Nevertheless, in the first decade and a half of devolution, there was still considerable Indonesian government tolerance of regional divergence from central government norms, but the law passed in 2014 was intended to facilitate maintenance of a greater degree of regional uniformity. In 2020, following complaints of corruption at regional levels, the central government enacted a statute centralizing the issuance of business permits in the Ministry of Investment.[172] On such matters, there was considerable dissatisfaction in Jakarta with the regions.

To be sure, these measures are hardly as extreme as the recurrent tendency of the central government to break its firm asymmetric commitments to Papua a short time after making them and then again in 2022. Both actions suggest a high level of determined central government dominance. But Papua is regarded by most Indonesians as sui generis.

We have seen that weak commitment can be conducive to reneging. This is especially true where an asymmetric region is too weak to resist. Post-communist Russia has, for years, been withdrawing powers that had been negotiated with autonomous regions. Perhaps most notably in 2017, Moscow reversed the generous arrangements it had made with Tatarstan more than

[169] Dylan O'Driscoll, "Autonomy Impaired: Centralisation, Authoritarianism and the Failing Iraqi State," *Ethnopolitics*, Vol. 16, no. 4 (2017), pp. 315–32.

[170] 1945 Constitution of Indonesia, as amended, art. 22D.

[171] The latter as a spiritual successor to Masjumi, a party of the 1940s and 1950s with a distinctive modernist ideology. Horowitz, *Constitutional Change and Democracy in Indonesia*, pp. 186–88.

[172] Act no. 11 of 2020 on Job Creation, amended by Act no. 6 of 2023 on Job Creation.

two decades earlier.[173] In Moldova, statutes and administrative actions have effectively retracted certain powers granted to Gagauzia,[174] a region with an unusually weak position vis-à-vis the center and with inadequate legal capacity to fight back.[175] Weak commitment and a weak region are the perfect combination for recentralization, as we have noted in the cases of pre-revolutionary Ethiopia, with its retracted federal arrangements with Eritrea, and Cameroon with English-speaking Cameroons. It is increasingly visible in Indonesia.

[173] I had been in Tatarstan in 1993, when its government was confidently negotiating the terms of its devolution with Moscow. When I broached the possibility of subsequent reneging, based on instances in other countries whose central governments had become stronger than they were at the time of devolution, I was met with skepticism on the part of very high officials there. The skepticism proved to be excessive years later, as Moscow withdrew its earlier concessions.

[174] Federika Prina, "Shrinking Autonomy for Tatarstan and Gagauzia: The Perils of Flexible Institutional Design," in Matteo Nicolini, Francesco Palermo, and Enrico Milano, eds., *Law, Territory, and Conflict Resolution: Law as a Problem and Law as a Solution* (Leiden: Brill, 2016), pp. 244–69.

[175] Walsh, *Self-Government as a Conflict Management Tool*, pp. 153–60, shows how an inadequately developed rule of law and inadequate legal capabilities on the Gagauz side have affected the quality and durability of devolution.

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6

Discrimination by Design

Constitutional Contradictions

In countries with serious problems of ethnic conflict, protection against discrimination is an essential function of government, and courts have an important role in fulfilling that function. As we have just witnessed, a great deal of ethnic discrimination, often severe discrimination, occurs in devolved units. The vast majority of constitutions adopted in the last half-century and a great many before that time have clearly stated guarantees of equality for ethnic, racial, and religious groups, and those constitutions typically provide for judicial review of governmental action for constitutionality. Provision for constitutional adjudication is often described as standard equipment to be imported into new constitutions. Frequently, however, guarantees of equality are unenforced, and judicial action or governmental action in general against ethnic discrimination in devolved units is absent.

How might courts manage to perform these functions? This, of course, is a very big question, but there is some experience on which to base some potentially fruitful conclusions.

To begin with, despite the common practice in inserting provisions for ethnic equality and for judicial review in new constitutions, the actual performance of that function leaves much to be desired. A prior condition is the establishment of a secure, capable judiciary enjoying a reasonable level of independence. How to reach this state is a contested question. There are several perspectives.

First, what has come to be called the insurance paradigm. It postulates that an independent judiciary emerges in countries in which political divisions are prominent and politicians in power anticipate with apprehension the day when their opponents will be in power. They prepare for this possibility by empowering judges who will then enforce legal protections in their favor, just as they currently enforce those that favor their opponents. Hence the analogy to an insurance policy.[1] Robust political competition tends to support

[1] Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge: Cambridge University Press, 2003); Jodi S. Finkel, *Judicial Reform as Political Insurance:*

judicial independence, whereas strong single-party dominance is conducive to its impairment.[2]

A second view is that public opinion can support judicial independence against politicians who regard it as limiting their power. If the public preference for independent courts is strong enough, it will punish politicians at the polls should they impair judicial independence.[3] This view rests on the political costs of impairment of judicial powers.

Both of these perspectives rest on external constraints operating on politicians, whereas a third derives from forces internal to the judiciary.[4] The role conceptions of judges rest on ideas about the functions they are to perform. These may be found in their own history or in the jurisprudential trends in neighboring or historically connected countries.[5] They may also be found in the traditions of the foreign countries that they understand and in which they may have studied.[6] For courts in common law countries, such as India, Kenya, Malaysia, and Nigeria, English law and custom are likely to constitute those traditions.

There is yet a fourth view worth considering. Courts may earn their independence by being useful to political authorities and the public. They may, for example, help to root out corruption that threatens a regime, thereby building trust with political leaders, or they may make the courts accessible for use by ordinary citizens, enhancing popular support as well, before turning to matters they could not have attended to without the trust and support they had accumulated.[7]

None of these perspectives is necessarily incompatible with the others, provided none is considered the exclusive explanation for the emergence of judicial independence. The fourth one, however, which I shall call *the service view*, has special application to countries that have adopted federal or

Argentina, Peru, and Mexico in the 1990s (Notre Dame: University of Notre Dame Press, 2008). Where political divisions are not pronounced, according to this view, a strong judiciary will not emerge. J. Mark Ramseyer, "The Puzzling (In)dependence of Courts: A Comparative Approach," *Journal of Legal Studies*, Vol. 23, no. 2 (1994), pp. 721–47.

[2] For a striking comparison, see Rebecca Bill Chavez, "The Construction of the Rule of Law in Argentina: A Tale of Two Provinces," *Comparative Politics*, Vol. 35, no. 4 (2003), pp. 417–37.

[3] Gretchen Helmke and Frances Rosenbluth, "Regimes and the Rule of Law: Judicial Independence in Comparative Perspective," *Annual Review of Political Science*, Vol. 12 (2009), pp. 345–66.

[4] Lisa Hilbink, "The Origins of Judicial Independence," *World Politics*, Vol. 64, no. 4 (October 2012), pp. 587–621.

[5] Ibid. Judges may be open to new ideas in their wider environment. See Ezequiel A. González-Ocantos, *Shifting Legal Visions: Judicial Change and Human Rights Trials in Latin America* (Cambridge: Cambridge University Press, 2016), on transnational influences on judges.

[6] Alan Watson, *The Evolution of Law* (Baltimore: Johns Hopkins University Press, 1985); Watson, "Legal Change: Sources of Law and Legal Culture," *University of Pennsylvania Law Review*, Vol. 131, no. 5 (1983), pp. 1121–58.

[7] Jennifer A. Widener, *Building the Rule of Law: Francis Nyalali and the Road to Judicial Independence in Africa* (New York: W.W. Norton, 2001).

devolved regional autonomy regimes. That is because of the essential role of the judiciary in adjudicating the boundaries between the powers of the central government and lower-level jurisdictions. There is a strong case for an independent dispute resolution mechanism in states that divide authority between the center and the regions, even if the system is not formally federal.[8] Often this mechanism is located in the courts.

During the nineteenth and early twentieth centuries, the United States Supreme Court was very active in deciding when states could regulate or tax interstate commerce, notwithstanding what was coming to be understood as the plenary power of the national government over interstate commerce. Similarly, the court was obliged to decide where federal authority ended when it impinged on the powers of the states. The Supreme Court became the umpire of the federal system.[9] As performance of this essential task expanded its authority, the court took on many new responsibilities that were also within its jurisdiction, culminating in decisions expanding civil liberties and civil rights in the twentieth century.

Federal courts in Australia and Canada were also involved in resolving difficult issues of central government powers vis-à-vis states and provinces, respectively.[10] Both moved on to assume other functions, including the decision of cases involving ethnic discrimination prohibited under statutes enacted in both countries. Belgium, which has been federalizing in stages to the present point, at which it enjoys a very weak and easily stalemated central government and very strong regional governments, requires the Constitutional Court to be the arbiter of its carefully defined central and regional powers.[11] That court also adjudicates alleged violations of its constitutional right to equal treatment and its constitutional prohibition of discrimination.[12]

Of course, it is an empirical assumption that federations requiring a judicial body to resolve conflicts between central governments and lower-level

[8] Ghai, "Ethnicity and Autonomy," pp. 20–21.

[9] Paul A. Freund, "Umpiring the Federal System," in Freund, *The Supreme Court: Its Business, Purposes, and Performance* (Cleveland: Meridian Books, 1961), pp. 92–114.

[10] See Leslie Zines, *The High Court and the Constitution* (Sydney: Butterworth, 1997); George F. G. Stanley, *A Short History of the Canadian Constitution* (Toronto: Ryerson Press, 1969). Interestingly enough, the Australian constitution, designed to create a relatively loose federation, was generally interpreted to sustain the central government's intrusions into the domain of the states, whereas the Canadian constitution (the British North America Act, interpreted by the Privy Council until 1949, when the final appeal process was lodged in the Supreme Court of Canada) was, for quite some time, interpreted to accomplish the reverse.

[11] Patrick Peeters and Jens Mosselman, "The Constitutional Court of Belgium: Safeguard of the Autonomy of the Communities and the Regions," in Nicholas Aroney and John Kinkaid, eds., *Courts in Federal Countries: Federalists or Unitarists?* (Toronto: University of Toronto Press, 2017), pp. 69–102.

[12] Ibid., pp. 100–01. The Constitutional Court of Spain also has the power to rule on the distribution of powers between the central state and the regions. Elena Merino-Blanco, *Spanish Law and Legal System*, 2nd ed. (London: Sweet & Maxwell, 2006), pp. 204–06.

provinces, states, or regions are also likely to have courts assume adjudicatory functions in other areas, including the prohibition of ethnic discrimination. It is worth investigating that assumption. When we do, we shall see that the ability of courts to fulfill one function does not necessarily imply the ability to fulfill the other.

To assess this, it is necessary to consider: (1) the availability of judicial review to police the boundaries between the center and the units; (2) the constitutional guarantees of equality; (3) the availability of judicial review to redress discriminatory action in violation of those guarantees; and (4) the actual practice of judicial review for these purposes. The evidence from the countries in which ethnic discrimination in devolved units constitutes a serious problem is at best equivocal.

We shall consider these questions by examining intensively six countries in Asia and Africa with strong constitutional commitments to devolution. Ethiopia, India, Nigeria, and Malaysia, all federations, have constitutional provisions authorizing, explicitly or implicitly, a body with jurisdiction to resolve disputes between the federal government and the states. In the latter three cases, these are courts; in Ethiopia, it is nominally a legislative body to which has been confided some quasi-judicial functions regarding federalism.[13] All four federal countries have substantial guarantees of equality and non-discrimination on grounds of ethnicity or religion and the availability of redress for violations,[14] but in each, as we shall see, there are impediments to their full realization. In Indonesia and Kenya, which have constitutionally sanctioned regional autonomy regimes, there are also judiciaries with broad powers of judicial review and guarantees of non-discrimination. In Indonesia, the Home Ministry was also charged with reviewing regional regulations. Whereas, up to now, we have ranged widely over a significant number of questions and countries, at this point I intend to change the lens and focus in greater detail on these six countries, with only occasional glances at a few others, in order to do a thorough review of the practices of each as they impinge upon the very serious matter of implementing guarantees of ethnic equality. We need to proceed country by country, because the specific sources of discrimination and legal responses to it are variable and idiosyncratic to each.

[13] 1949 Constitution of India, as amended, art. 131; 1999 Constitution of Nigeria, as amended, art. 232(1); 1957 Constitution of Malaysia, as amended, art. 128(1)(b); 1995 Constitution of Ethiopia, as amended, art. 62(1), (2), (3), (6).

[14] 1949 Constitution of India, as amended, arts. 14–16, 19, 30, on rights; on remedies, arts. 13, 32; 1999 Constitution of Nigeria, as amended, arts. 41(1), 42(1), and directive principles, art. 15(2); on remedies, arts. 36(1), 233(2)(b), 241(1)(c), 251(1)(a), (q); 1957 Constitution of Malaysia, as amended, arts. 3(1), 8(2), 11(1), on rights; on remedies, art. 128(1)(a). For Ethiopia, see note 15.

Failures of Constitutional Design

In this chapter, we shall focus on Ethiopia, India, and Nigeria; in the next, on Malaysia, Indonesia, and Kenya. In the first three cases, one might say, perhaps uncharitably, that the constitution speaks with a forked tongue. While it guarantees a panoply of rights to equality irrespective of ethnic origin, the constitution also provides, explicitly or implicitly, for a variety of categorical exceptions to those guarantees, as applied within devolved units, that make it very hard for courts or other bodies to provide redress. The exceptions derive, in some measure, from benign intentions, but from divergent sources: the desire to provide homelands for the main groups that fought the previous regime in Ethiopia, which had repressed several of them, the need to protect tribal groups in India's Northeast, and the determination to take measures against a recrudescence of the overwhelming political power of a single ethnic group in Nigeria. Fulfilling these objectives has nonetheless given rise to considerable discrimination that is hard for courts to cope with.[15]

In the second three cases, dealt with in the next chapter, the source of the problem of redress does not lie in the constitution, the equality and nondiscrimination provisions of which are unqualified. Rather, the problem lies in the interpretations and practices of courts, which, despite constitutional provisions that are unambiguously favorable to equal treatment, have inadvertently, and to varying degrees, created or tolerated official actions creating discrimination and inequality in devolved units. That is, courts have had difficulty redressing discrimination in devolved units, although it is without any warrant in their constitutions.

As I have just suggested, the obstacles to effectuating these guarantees are various. No two of the six countries encounter exactly the same problems. In none can the ability of courts or other bodies to police the boundary between the power of the central government and the power of the constituent states or regions be said to be a good predictor of their power to reduce ethnically discriminatory behavior inside the respective units. The precise obstacles are various and serious.

Of course, judicial enforcement alone would not necessarily solve the problem of discrimination. Commitments from governing authorities and from the police to equal enforcement of constitutional norms are also important, but without the courts, the task becomes truly herculean.

[15] Ethiopia's constitutional contradiction of its equality guarantees derives, however, from the need to propitiate the main ethnic groups whose militias fought to rid the country of the Mengistu dictatorship and were disproportionately influential at the time a new constitution was framed.

Ethiopia: Mission Unfulfilled

Start with Ethiopia, which was intended to be an ethnic federation, one that purports to provide homelands for large and medium-sized groups, with smaller groups clustered in a number of states and larger and some smaller groups spilling over state boundaries as well. As we have observed, Ethiopia's heterogeneous cities and states are riddled with discriminatory practices. The Ethiopian constitution provides for equality and non-discrimination without regard to ethnic origin, and it declares that "the law shall guarantee" these rights.[16] The upper house of the Ethiopian parliament, the House of the Federation, with at least one representative of each ethnic group and one more for each one million of population in a state, is assigned the role of umpire of federal matters and indeed of all constitutional disputes and is charged with promoting "equality of the peoples of Ethiopia."[17] Together with the lower house, it has the authority to intervene when any state has denied human rights.[18]

Elected indirectly by the various State Councils,[19] the House of the Federation might be expected to deal with federal-state and interstate disputes, as well as with state violations of the constitution, including those involving ethnic discrimination. With few exceptions, however, the House of the Federation, all of whose representatives have tended to be members of the ruling party or its affiliates, has been inactive in these areas.[20] Likewise, the federal government has long been intruding into the prerogatives of the states without resistance from the House of the Federation.

In a rare case of discrimination that reached the House, candidates from a large minority of long-term migrants from Ethiopia's highlands, comprising 47 percent of the population of Benishangul-Gumuz state, who did not know any of the local languages, had been denied the opportunity to stand for election to office in that state. When they appealed to the House of the Federation, a majority of its advisory body, the Council of Constitutional Inquiry, which is appointed to screen cases and is chaired by the president of the Federal Supreme Court,[21] found they were eligible to run. When the House itself took up the case, it found the state's requirement of familiarity with a state's working language to be consistent with the constitution. In

[16] 1995 Constitution of Ethiopia, as amended, art. 25. See also art. 39.
[17] Ibid., arts. 61(2), 62(1), 62(4).
[18] Ibid., arts. 55(16), 62(5).
[19] Ibid., art. 61(3).
[20] Erk, "Nations, Nationalities, and Peoples," p. 225.
[21] The Council has a majority of judges and "legal experts." 1995 Constitution of Ethiopia, as amended, art. 82(2).

Benishangul-Gumuz, however, the working language was not any local language but Amharic, and on this basis the House of the Federation decided that the applicants, knowing that language, were eligible to stand in future elections.[22] This was an unusual instance of the House of the Federation's intervention in a case of discrimination. For the most part, it has functioned not as a neutral adjudicator but as "a political organ dominated by the ruling party ...."[23] Apart from this easy case, the House of the Federation seems to have provided little or no protection from ethnic discrimination.

Indeed, the House has not performed most of the functions assigned to it. As of 2017, 23 years after the constitution was adopted, it had not decided a single dispute concerning the division of powers between the federation and the states.[24] To be sure, the House has decided what are conceived to be self-determination disputes, most notably whether a purported ethnic subgroup is really a separate ethnic group deserving of some territorial accommodation to accord it a homeland. Yet, rigidly subordinate to the government, the House has not permitted challenges to governmental authority.

Although the constitution contains a clause that might easily authorize other bodies, especially the courts, to redress breaches of specified human rights,[25] the jurisdiction of the House has been considered to be exclusive. The result is that the courts and the House both abstain from protecting minority rights, which remain essentially unprotected.

What this inaction reflects is the fragile state of the ethnic dictatorship that governed Ethiopia after the insurgency that ousted Mengistu Haile Mariam in 1991. The successor regime was led by the Tigrayan People's Liberation Front until the election of Abiy Ahmed as prime minister in 2018. The Tigrayans comprised about 7 percent of the population but controlled nearly every political and economic institution, including many business opportunities. Under these circumstances, it would have been perilous for the regime to permit genuine adjudication of the numerous ethnic grievances that had accumulated. As the Abiy Ahmed regime slowly unwound the existing dictatorship, it faced resistance from Tigrayans that ultimately led to civil war,[26] again thwarting possibilities for constitutional reform that had originally

[22] Assefa Fiseha, "Constitutional Adjudication through the Second Chamber in Ethiopia," *Ethnopolitics*, Vol. 16, no. 3 (2017), pp. 295–313, at pp. 300–01.

[23] Ibid., p. 306.

[24] Gedion T. Hessebon and Abduletif K. Idris, "The Supreme Court of Ethiopia: Federalism's Bystander," in Nicholas Aroney and John Kinkaid, eds., *Courts in Federal Countries: Federalists or Unitarists?* (Toronto: University of Toronto Press, 2017), pp. 165-92, at p. 185.

[25] 1995 Constitution of Ethiopia, as amended, art. 13(1).

[26] From 2020 to 2022. It also stimulated renewed fighting by Oromo rebel forces in Oromia.

been opened up. Since that time, Ethiopia has edged closer to further internal warfare, with attacks on Amhara territory and officials, displacement of populations, and the growth of ethnic militias and violence. And so, the promises of the constitution with respect to ethnic-homeland states remain, but the many grievances created by those states in a thoroughly heterogeneous country, where geography and demography are not well matched, remain unredressed in a disorderly environment.

There is, however, another reason for Ethiopia's inability to adjudicate the unconstitutionality of ethnic discrimination in the states. At the root of this problem is the assumption that the states are the homelands of the titular nations that are located there: Amhara in Amhara state, Oromo in Oromia, Somalis in Somali state, and so on. We have seen earlier the extent to which the equality guarantees of the federal constitution are contradicted by the extent to which state constitutions explicitly identify the regional state as such a homeland, reserving certain governmental powers, elected offices, and civil rights to the homeland peoples. A series of fundamental constitutional contradictions such as these, across multiple states, can scarcely be resolved by routine exercises of judicial (or quasi-judicial) review. And wholesale reform in the direction of reducing the privileges of the titular nations can hardly be on the agenda when warfare might be precipitated and some large ethnic groups already have their forces at the ready.

India's Northeast: Protection for Some

India's constitution has extensive rights provisions and a vigorous practice of judicial review that includes reviewing state regulatory actions.[27] Judicial scrutiny of state action that intrudes on constitutionally protected minority rights has been scrupulous.[28] These constitutional protections are considerably attenuated in Northeast India and on certain matters elsewhere. Despite article 16, for example, forbidding discrimination in employment, the Supreme Court has been rather tolerant of discrimination based on the nonlocal origins of the complainant, if residence requirements had been in force

[27] See Wilfried Swenden and Rekha Saxena, "Policing the Federation: The Supreme Court and Judicial Federalism in India," *Territory, Politics, and Governance*, Vol. 10, no. 1 (2022), pp. 12–31; C. K. Sharma and Wilfried Swenden, "Continuity and Change in Indian Federalism," *India Review*, Vol. 16, no. 1 (2017), pp. 42–65.

[28] See Thiruvengadam, *The Constitution of India*, pp. 187–88, 202–04. See, e.g., Committee for C.R. of C.A.P. v. State of Arunachal Pradesh, AIR 2015 SC 3750 (Sup. Ct.).

in a state before the independence of India or before a state joined the country after independence, as Sikkim did.[29] The same has been true elsewhere in India for residence requirements for admission to educational institutions for professional training, provided those residence requirements did not reserve more than a "reasonable" number of places for domiciliaries of the state imposing them.[30] Of course, migrants from out of state are disproportionately likely to be members of ethnic groups different from those who have resided in the state since birth, so the effect of exclusion is to discriminate on ethnic grounds, despite the very broad language of article 15 of the constitution, forbidding discrimination on the basis of ethnic origin and place of birth, and article 19, guaranteeing freedom of movement and residence anywhere in the country.

More centrally relevant to the present inquiry are restrictions enforced only in the northeastern states. The Sikkim case, mentioned above, is similar to those but is exceptional because of Sikkim's unusually late accession to India. Particularly pertinent are the extensive provisions of the Sixth Schedule of the Indian constitution that concern the administration of tribal areas in four northeastern states but implicate the same constitutional rights. These provisions have granted discretion in the creation of new, self-governing units, based on tribal identity, that incentivize tribal groups to press for the creation of jurisdictions in which they can govern and exclude others from governing and benefiting from rights and opportunities accorded to the governing tribal groups.

The Sixth Schedule has its roots in "excluded areas" created during the colonial period to protect tribal peoples from incursions, both demographic and economic, by migrants from other areas. Scheduled Tribes, about 8.6 percent of the Indian population, consist of some of the most impoverished people in India.[31] Many tribals live in relatively compact areas, but many also live in close proximity to other Indians (tribal and non-tribal) in their midst. Although there are prohibitions on land transfer to non-tribals, tribals have nonetheless been victims of displacement due to development of their lands, and many have not been resettled.[32] Concern for their welfare

[29] State of Sikkim v. Surendra Prasad Sharma, 1994 AIR 2342, 1994 SCC (5) 282 (Sup. Ct.). Preferences for domiciliaries of the Telangana region of Andhra Pradesh against residents of other areas, of the then-state, such as Ryalaseema or the Coast, had previously been upheld on similar grounds.

[30] *Dr. Pradeep Jain v. Union of India*, 1984 AIR 1420, 1984 SCR (3) 942 (Sup. Ct.).

[31] Namita Wahi and Ankit Bhatia, "The Legal Regime and Political Economy of Land Rights of the Scheduled Tribes in the Scheduled Areas of India," Centre for Policy Research, New Delhi, 2018, pp. 11, 35.

[32] Niraja Gopal Jayal, *Citizenship and Its Discontents: An Indian History* (Cambridge: Harvard University Press, 2013), p. 321n.30.

began before independence and continues today. Indeed, that concern sometimes preempts equivalent concern for the interests of other peoples in their midst.[33]

The Sixth Schedule applies to half of the eight states of the Northeast: Assam, Meghalaya, Tripura, and Mizoram.[34] The schedule accords governors of those states, acting at the behest of state chief ministers and cabinets, the power to declare certain tribal areas to be autonomous districts and regions, governed by elected councils, and it provides governors of each of the states the authority to create new autonomous district councils (ADCs) and autonomous regional councils (ARCs), sometimes by redrawing the boundaries of existing councils.[35] The governor is authorized to make rules for the composition of such councils and for the delimitation of electoral constituencies and terms of office.[36]

Each council is accorded extensive powers of a legislative, executive, and even judicial kind.[37] Councils may make laws regarding land, water, the establishment of village or town committees or councils, inheritance, marriage and divorce, and social customs; may establish and manage schools, markets, transport, and fisheries; and may collect taxes on land, buildings, professions, trades, animals, vehicles, and goods. In other words, many aspects of social and economic activity fall within the purview of the councils' authority.[38] Councils may make regulations to control trading by people other than members of Scheduled Tribes and may prohibit such people from doing business within the council area.[39] And councils also are authorized to grant licenses and leases to explore for and extract minerals,[40] an important power in the often mineral-rich states of the Northeast. Perhaps equally important, national or state statutes that are to be uniformly applied with respect to other territories may be declared inapplicable to territories governed by local or regional councils, upon the decision of the president or

[33] Some activist groups regard non-tribal merchants in tribal council areas entirely through the lens of tribal protection, without regard to the useful economic functions they may perform. See, e.g., "The Functioning of Autonomous Councils in Sixth Schedule Areas of North Eastern States," Action Aid India, Bhubaneswar, Odisha, 2016, p. 28.

[34] 1949 Constitution of India, as amended, art. 244(2). The Fifth Schedule applies to tribes in other states and provides only advisory bodies rather than councils with extensive governmental powers, which the Sixth Schedule allows.

[35] 1949 Constitution of India, as amended, Sixth Schedule, arts. 1, 2.

[36] Ibid., art. 2(6).

[37] Ibid., arts. 2(4), 4(1), 4(2). The governor may, however, designate a High Court to take over cases being conducted in a council's jurisdiction. Ibid., art. 4(3).

[38] Ibid., arts. 3, 6(1), 8.

[39] Ibid., art. 10.

[40] Ibid., art. 9.

governor—meaning the national or state government—depending on the origin of the statute and the particular state concerned.[41]

To be sure, despite these extensive autonomous powers, governors—that is, state governments—retain the ability to order investigations into the conduct of a council, to annul any of its laws, and to dissolve a council and either order a new election or directly assume authority over the council's administration.[42] Nevertheless, the Sixth Schedule allows ethnically based authorities to conduct governmental affairs, with a conspicuous absence in the schedule for the protection of the rights of non-members of the governing tribal group.

In Chapter 5, we have seen some of the dysfunctional effects of the Sixth Schedule and the incentives it creates for tribal groups to use extreme measures to secure a council for themselves and for central and state-level politicians seeking support to oblige them by creating new councils.[43] Sanjib Baruah has studied the effects of Sixth Schedule autonomy regimes, which he characterizes as colonial protocols of tribal protection and exclusion that have been "repackaged" as positive discrimination for tribals considered to be indigenous to a particular state.[44] The result is exclusive access to public employment, licenses to conduct business and trade, rights to own land and to stand for public office, and disproportional numbers of reserved seats in legislative bodies.

As we have already observed, these autonomous units have usually been formed after armed insurgencies, and the threat of violence generally remains in the background to support the demands of the former insurgents, who have partnered with electoral politicians.[45] As Baruah says, state governments have sometimes established such partnerships with armed organizations that have used deadly violence to gain the privilege to extract rents, with minorities at their mercy. By some accounts, there are more than 100 rebel groups in the Northeast, many of them connected to politicians, state functionaries, and contractors engaged in resource extraction.[46]

What has emerged from these arrangements has been described as a form of "ethnic autocracy," in which winners in violent battles for local supremacy gain power over councils. Their victory is recognized by state authorities,

[41] Ibid., arts. 12, 12A, 12AA, 12B.

[42] Ibid., arts. 14, 15, 16, respectively.

[43] Some tribes located in states subject to the Fifth Schedule have demanded that they be governed under the Sixth, with its more expansive powers.

[44] Baruah, *In the Name of the Nation: India and Its Northeast* (Stanford: Stanford University Press, 2020), especially pp. 76–99.

[45] See ibid., pp. 1–24.

[46] Jelle J. P. Wolters, "Introduction" to Wolters, ed., *Vernacular Politics in Northeast India*: *Democracy, Ethnicity, and Indigeneity* (Oxford: Oxford University Press, 2022), pp. 28–29.

who avert their gaze as the victors shore up their position against rivals, often using violence and electoral manipulation, and exploit the many opportunities available for enrichment—provided only that they refrain from attacks on state or central government forces. The state and center gain "stability" and reciprocal political support.[47]

Tribal elites have done very well out of these arrangements. Since land often cannot be sold or leased to non-members of the group or to private companies,[48] land concentration has become common. In coal-rich Meghalaya state, for example, the Scheduled Tribal political class is heavily invested in the coal business, although it contracts out operations to non-tribals, securing rents from restricted ownership. There are similar arrangements in the timber industry of Arunachal Pradesh. The privileges granted to Scheduled Tribes create incentives to succumb to the temptation, at least at the elite level, to become avid rent seekers.

Groups that have been successful through the ADC device attract emulation in the state and throughout the Northeast. Others demand recognition as Scheduled Tribes; those who already have that status demand a territory and a council they can control; and increasingly some who control a council under the Sixth Schedule demand a separate state, while others demand to be exempted from the territory of a Scheduled Tribe-controlled council.[49] In 2023, a judge of the Manipur High Court directed the state government to consider the longstanding request of the Hindu Meitei, a 53 percent majority in the state who are settled in valley areas, to be considered for Scheduled Tribal status. Hill-dwelling Christian Scheduled Tribes, fearing an influx of Meitei settlers who are currently unable to buy land in the hills, protested, and an armed militia of the upland Kuki tribe attacked villages in the valley, burning houses and displacing at least 70,000 villagers, mainly Meitei, over

[47] The process is richly documented for multiple jurisdictions by Bethany Lacina, "The Problem of Political Stability in Northeast India: Local Ethnic Autocracy and the Rule of Law," *Asian Survey*, Vol. 49, no. 6 (2009), pp. 998–1020. For the very different view that devolution to tribal units in the Northeast has helped to create an integrated national community of "interlinked institutions," that tribal leaders and organizations have contributed to "sustaining constitutional government" there, and that "narratives of violence and alarm" have received excessive emphasis, see Jyotirindra Das Gupta, "Community, Authenticity, and Autonomy: Insurgency and Institutional Development in India's Northeast," *Journal of Asian Studies*, Vol. 56, no. 2 (1997), pp. 345–70, at pp. 362, 368, et passim.

[48] See *Samata v. State of Andhra Pradesh & Ors*, AIR 1977 SC 3297 (Sup. Ct. 1997).

[49] For recursive disputes over territorial demarcation and demands for council authority on the part of groups left out of earlier demarcations, see, e.g., Aniruddha Kumar Baro, "Multilevel Governance and Ethnic Riots: Challenges to Rural Development in Goalpara District of Assam," *IJCRT*, Vol. 6, no. 2 (2018), pp. 1600–04, at p. 1602, describing claims, following the grant of an ADC to Bodos, by the Rabha-Hasong group for an ADC. When that was also granted, the decision led to demands by Garo tribals and also by non-tribals, but in their case to be excluded from the ADC's territory. It was claimed that hundreds of Garo and non-tribal villages were to be included in the Rabha-Hasong Autonomous Council (RHAC), as were mixed villages in which the tribal population was below 50 percent.

the course of several months, even after security forces intervened.[50] There followed killings of Kukis in lowland urban areas to which they had migrated for schooling or employment.

Restrictions on land ownership, as well as educational opportunities and civil service employment, are prized privileges of Scheduled Tribe designation, sought by those who lack them and defended by those who have them. As violence can be used to press for Scheduled Tribe recognition, so can it be employed in an attempt to prevent others from attaining that recognition. In Manipur, the violence was so extreme that members of both groups began to advocate division of Manipur into two separate states.

The state government, as we have seen, controls the allocation of seats in the autonomous councils. These are heavily weighted toward seats reserved for the ethnic group in whose name the council was established. Seats for which others can contest are limited. The same is true of most state legislatures in the Northeast, as we shall soon see. Wherever Scheduled Tribes are in a majority, the majority of seats are reserved, often disproportionately so, and the demarcation of council boundaries is made difficult by the frequent mixture of groups in areas claimed initially by one and then by others. In Arunachal, with a Scheduled Tribal population of 68.8 percent of the state total, fully 59 of the state assembly's 60 seats are reserved for members of Scheduled Tribes. The remaining one-third of the state's population might be represented by the one unreserved seat, but only if that minority—actually, any of those minorities—can win it.

The effect of devolving extensive autonomy to states or autonomous councils within states, whose raison d'être is to provide governmental authority to specific ethnic groups, is to exclude non-members of those groups who live in their midst from the central human rights protections of the Indian constitution, several of which are expressly allowed to be suspended in the service of protection of Scheduled Tribes.[51] Or at least that is what the law seems to be. So, what the Sixth Schedule authorizes are regimes supported by local majorities, mainly elected in ethnically reserved seats that establish

[50] *Hindustan Times*, May 30, 2023; *Times of India*, May 28, 2023; *Economic Times (ET Online)*, May 6, 2023. In 2024, however, based on a more nuanced understanding of the way tribes are included in the Scheduled Tribe list for a state, the High Court decided that the order was contrary to Supreme Court doctrine that courts are not to be involved in deciding whether to include a tribe in the list. Mutum Churamani Meetei v. State of Manipur, Review Petition no. 12 of 2023, MANU/MN/0016/2024 (High Ct. Manipur).

[51] 1949 Constitution of India, as amended, arts. 15(4), 16(4A), 19(5), regarding, respectively, rights to be free of discrimination on grounds of religion, race, caste, sex, or place of birth; to equal opportunity in employment; and to "move freely, reside and settle" in any part of the country and to practice any profession, occupation, trade, or business. The rights in article 19(5), including the right to settle anywhere in India, are subject to "reasonable restrictions" in Sixth Schedule areas.

and legitimize ethnic-majority rule, which is often characterized by discriminatory practices, in land, employment, and even taxation, against outsiders. The Khasi-Jaintia ADC in Meghalaya, for example, was reported in the 1990s to abstain from taxing tribal residents, 86 percent of the state's population—except very modestly—in favor of taxing non-tribals heavily, in order to make "their lives less pleasant, with the intention of dissuading new migrants."[52] Those outsiders include both tribals who do not share the identity of the titular tribal group (or of its prevailing faction) and non-tribals, either from within or originally from outside the state, but who may have been in the state or the council area for generations.[53]

Around the democratic world, including India, ethnically reserved seats have been conventionally understood to guarantee minimum representation for small or socially excluded minorities, not to protect a group with exclusive claims to an entire territory from electoral competition with members of other groups residing there and certainly not to facilitate the exclusion of other groups from the benefits of full citizenship. Northeast India is different.

Restrictions on economic activity facilitate rent-seeking behavior, lawful or otherwise, on the part of those who benefit from the restrictions, increasing costs and commonly creating a sense among those subject to the restrictions that rules are irrational and made to be evaded. That appears to be true in the Northeast.

The Sixth Schedule creates a regime, obviously well intended, that, through explicit exceptions, is conducive to abrogation of rights on ethnic grounds that are applicable everywhere else in India. Although reservations for Scheduled Tribes were a contested matter in the Constituent Assembly that framed the Indian constitution,[54] they obviously are well entrenched in the constitutional fabric and serve useful protective purposes. The question that decades of experience have not yet answered pertains not to the existence of these rights and governmental powers but to their extent, insofar as they impinge on the rights of those who live in close proximity to Scheduled Tribes and particularly those subject to the jurisdiction of devolved areas, whether those

[52] David Stuligross, "Autonomous Councils in Northeast India: Theory and Practice," *Alternatives*, Vol. 24, no. (1999), pp. 497–526, at pp. 508–09, 523n.37.

[53] They seem to experience Meghalaya as a Megoliath. See, e.g., the *cri de coeur* of Govind Battacharjee, "Meghalaya and the Sixth Schedule: Why the Constitutional Protection Needs to Be Revisited," *India Express*, December 18, 2020, describing violence against, and expulsion of, non-tribals of many different Indian ethnic groups, reluctance of the state government (with 91 percent of the legislative seats reserved for tribals) to protect them, reservation of 85 percent of jobs for tribals, and prohibition of any land transfer to non-tribals. Even where legislative seat reservations do not disproportionately favor Scheduled Tribes, favoritism, especially in access to land, can make life difficult for non-Scheduled Tribes, and violence can result from conflicting demands.

[54] Jayal, *Citizenship and Its Discontents*, p. 237. I discuss those deliberations in Chapter 7.

are states or district or regional councils. It is one thing to make accommodations for the benefit of Scheduled Tribes, given their current situation, but another to create a sharply contrasting governing class and a subject class that are defined ethnically and enjoy very different constitutional statuses.

The Indian Supreme Court has taken cognizance of the rights of people from the Northeast of the country to be free of discrimination and abuse in other parts of India.[55] As we shall observe later, however, the court has not taken full cognizance of the extent to which practices have developed under the Sixth Schedule of the constitution to deprive minorities—and sometimes, as we have seen in Bodoland, majorities—in devolved areas of the Northeast of fundamental rights afforded by that constitution.[56]

Nigeria: Indigeneity Run Amok

India's Northeast is not the only territory in which initial good intentions produce seriously negative consequences. As we have seen, Nigeria's desire to avoid a profusion of cabinet ministers from the same ethnic group led to the indigeneity requirement, which was extended to indigenous preferences within states, creating enormous hardships for millions of its citizens at state and local levels who were declared to be non-indigenes of those areas.

Nigeria's Supreme Court is no stranger to constitutional adjudication. The court has frequently been obliged to draw the boundary between federal and state powers. It has exclusive original jurisdiction in cases between a state and the federal government or between states if they involve any question on which a legal right depends.[57] There have been multiple cases involving the distribution among states of revenues from natural resources, most notably oil, the fiscal authority of states, the powers of local governments, and similar boundary questions.[58] The constitution allocates many more powers to the federal government than to the states, as already discussed, and the Supreme Court has mainly followed the politicians in their centralizing tendencies.[59]

[55] See Karma Dorjee v. Union of India, AIR 2017 SC 113 (Sup. Ct. 2016).

[56] It should be borne in mind, however, that some applicable rights provisions may have to yield to "reasonable restrictions on" their exercise "for the protection of the interests of any Scheduled Tribe." 1949 Constitution of India, as amended, arts. 15(4), 19(5). But compare ibid., art. 16, on non-discrimination in public employment.

[57] 1999 Constitution of Nigeria, as amended, art. 232(1).

[58] Rotimi T. Suberu, "The Supreme Court and Federalism in Nigeria," *Journal of Modern African Studies*, Vol. 46, no. 3 (2008), pp. 451–85; Patrick Ukata, "Federalism and the Courts in Nigeria," in Yonatan T. Fessha and Karl Kössler, eds., *Federalism and the Courts in Africa* (London: Routledge, 2020), pp. 28–46.

[59] For which see Rotimi T. Suberu, "Constitutional Infidelity and Federalism in Nigeria," in Charles M. Fombad and Nico Steytler, eds., *Decentralization and Constitutionalism in Africa* (Oxford: Oxford University Press, 2019), pp. 101–32.

Nevertheless, it has upheld state powers on a number of occasions.[60] Still, it has generally steered clear of the most sensitive political questions, such as those involving the lawfulness of state Shariah jurisdiction, and especially those concerning "ethno-political entanglements."[61]

This caution has meant that the largest contradictions of Nigeria's constitution have persisted for decades: those between constitutional guarantees of equality of all Nigerians and the preferences for indigenes that produce the most mischievous consequences, including periodic mass violence. In Chapter 5, I sketched some of Nigeria's constitutional guarantees. As we go more deeply into this problem, I am going to elaborate on them.

First, there are directive principles of state policy, which are generally not justiciable in Nigeria,[62] although courts do refer to them from time to time. We have reviewed those that require the composition of the federal government "to reflect the federal character of Nigeria" and to insure "that there shall be no predominance of persons from a few States or from a few ethnic or other sectional groups in that Government or in any of its agencies,"[63] and the equivalent composition of state and local governments "to reflect the diversity of the people within [their] area[s] of authority and the need to promote a sense of belonging and loyalty among all the people of the Federation."[64] The principles also impose a "duty of the State to provide adequate facilities for and encourage free mobility of people . . . throughout the Federation"[65] and to "secure full residence rights for every citizen in all parts of the Federation."[66] These provisions might envision quotas for representation in government bodies at federal and state levels,[67] but they do not reflect any constitutional preference for "indigenes" within states or localities.

The operational parts of the constitution are generally of a piece with the quoted principles of state policy. They declare that every citizen "is entitled to move freely throughout Nigeria and to reside in any part thereof" and to acquire and own land "anywhere in Nigeria."[68] Similarly, there is a broad provision prohibiting discrimination solely on account of membership in "a particular community, ethnic group, place of origin, religion or

[60] For examples, see Suberu, "The Supreme Court and Federalism in Nigeria," pp. 470–71.
[61] Suberu, "Constitutional Infidelity and Federalism in Nigeria," p. 127.
[62] 1999 Constitution of Nigeria, as amended, art. 6(6)(c).
[63] Ibid., art. 14(3).
[64] Ibid., art. 14(4).
[65] Ibid., art. 15(3)(a).
[66] Ibid., art. 15(3)(b).
[67] They are consistent with an attempt to prevent a revival of the disaffection and conflict that were prevalent, especially in the then-Northern Region immediately after independence, due to the greatly disproportionate presence of southerners in Northern Regional, as well as federal, public services.
[68] 1999 Constitution of Nigeria, as amended, arts. 41(1), 43.

political opinion" and forbidding the imposition "by executive or administrative action" of "disabilities or restrictions to which citizens of Nigeria" of other such affiliations are not subject.[69] Neither may they be accorded any privilege or advantage on those grounds.[70]

Taken together, these provisions evince an intention to achieve ethnic and regional equal protection of the law. They do, however, bump up against provisions mandating indigeneity.

The origin of the indigeneity mandate is found in article 147(3) concerning appointments to the cabinet, which requires them to be consistent with the federal character directive described above. Recall, however, the proviso that "the President shall appoint at least one Minister from each State, who shall be an indigene of such State."[71] Not a resident, not a citizen of that state, but an *indigene*.

This is a provision that reflects fear of favoritism, with antecedents even before independence, a fear especially prominent in the North, that northern Nigeria "would in effect be a backward protectorate governed by southerners,"[72] but then easily generalized to other regions, especially after the alternating domination of northern and southern political forces in the 1960s. The history, which I mentioned earlier, was at the root of indigene preferences, and is important.

As Daniel Bach has explained,[73] these concerns in the North led to a growing tendency, shortly before independence, to draw distinctions between opportunities available to those designated as belonging to the local community and those not belonging to it. Bach cites a 1954 law allowing a "native authority" in the Northern Region to expel any "native who is not a member of the native community living in the area of its authority" if that person cannot prove that "his means and legitimate labour are sufficient" to support himself and his family.[74] Distinctions of this kind and resentment of the heavily disproportionate representation of Igbo and other southerners in the Northern Region civil service laid the foundation for post-independence restrictions, enforced against non-indigenes, principally in land ownership and public employment.

[69] Ibid., art. 42(1)(a).
[70] Ibid., art. 42(1)(b).
[71] Ibid., art. 147(3).
[72] James S. Coleman, *Nigeria: Background to Nationalism* (Berkeley: University of California Press, 1958), pp. 360, 363.
[73] Bach, "Indigeneity, Ethnicity, and Federalism," in Larry Diamond, Anthony Kirk-Greene, and Oyeleye Oyediran, eds., *Transition without End: Nigerian Politics and Civil Society under Babaginda* (Boulder: Lynne Rienner, 1997), pp. 370–89, at p. 376.
[74] Northern Region of Nigeria, Native Authority Law, no. 4 of 1954, sec. 47(1).

It also seems that some aspects of customary law had earlier made distinctions between indigenes of an area and settlers. A 2014 case decided by the Nigerian Court of Appeal had articulated a rule said to be derived from customary law in Igboland that recognized the right of a settler migrating from a different area to deforest land and claim ownership of it, if the land were not already owned by another.[75] But then the court went on to muddy the category of "settler" by referring to such a person as one who is accepted as an "indigene" in the area where the land is located.[76] The point here is not, however, the court's conceptual imprecision of the distinction between two categories of citizen but rather the sense that differences in the rights of settlers and indigenes seem to have been established in the customary law—although this formulation might be a judicial projection of the present onto the past. But if it does reflect the past in Igboland and is generalizable to other regions, it may account for the easy resonance of such distinctions in multiple states and localities and their widespread adoption, even in the face of strong constitutional provisions that look unfavorably on discrimination against people who were born elsewhere.

Indeed, customs regarding land may have played a more general role in explaining the local importance of indigeneity. Traditional rulers in Nigeria often have had authority over land and have seen it as part of their ethnic patrimony. To be obliged to distribute land to all applicants without regard to local ethnic connections would likely have struck the rulers as degrading their power; and other officials may have had a similar sense in their own spheres of authority.[77] It is a short step to extend these discriminatory practices to multiple spheres of activity.

In the 1950s and early 1960s, some restrictions on opportunities available to geographically mobile citizens, while often onerous, pertained only to the territory of the three (later four) regions, but they began to bite harder with the creation and proliferation of states, from 12 to 19, then to 30, and later to 36.[78] A person could then be deprived of significant opportunities in the whole country, except in the one state and one local government authority (LGA) in which he or she might be classified as indigenous.[79]

[75] *Okereafore v. Nkwocha & Ors*, [2014] LPELR 23296 (Ct. App.).

[76] In this case, the court decided that title had already been established by someone else and denied the claim of the settler's son.

[77] In general, however, customary law in Nigeria has not been faring well when it conflicts with constitutional protections. See, e.g., *Chukwu v. Amadi*, [2009] 3 NWLR 56 (Ct. App.); *Anode v. Mmeka*, [2008] 10 NWLR 1 (Ct. App.); *Timothy v. Oforka*, [2008] 9 NWLR 204 (Ct. App.).

[78] See Bach, "Indigeneity, Ethnicity, and Federalism," p. 377.

[79] Although a person whose parents or grandparents had origins in more than one state could, in practice, be declared an indigene in more than one, most people had no such possibilities.

With the 1979 constitution came the presidential form of government, "federal character," and the indigene–non-indigene distinction that accompanied it, imported from criteria to be included in the federal cabinet to authorize discrimination broadly against non-indigenes at the state and local levels.

The indigenousness provision relating to the composition of the cabinet was inserted to preclude a president from the South of the country, for example, from appointing a southerner resident in the North—worse yet, someone from the same ethnic group as the president—to represent that northern state in the cabinet. Exactly this concern was reflected in the deliberations of the Constituent Assembly of 1978, which resulted in the 1979 constitution, when it was feared that, without a requirement that only indigenes of states be appointed to the cabinet, there would be "nothing to stop the President from choosing people who belong to one ethnic group if he wants to, because we are free to live in any part of the country."[80] Apprehension of ethnocratic government was so strong that it preempted any sense that political considerations, including those prominently built into other constitutional provisions,[81] might produce a cabinet more or less representing the ethnic diversity of the country without the need for the indigeneity requirement.

The same apprehension was felt regarding civil service appointments, and it extended to the state as well as the federal level. On these grounds, "belonging to" a state meant being indigenous to that state, a matter made explicit by a clause in the "Interpretation" portion of the constitution,[82] as I mentioned previously.

These matters had been explored in the extended constitutional process that began five years after the conclusion of the Biafra war of secession in 1970 and ended with adoption of the 1979 constitution. In that document the relevant provisions of the 1999 constitution, including the clauses on "federal character," on composition of the federal cabinet, and on requiring state governments to "recognize the diversity of the people within its area of authority" first appeared. There were dissents in the Constitutional Drafting Committee, in which two members argued against the ancestral determinism of the indigenousness standard. They feared that standard would restrict

[80] Umaru Dikko, quoted in Bach, "Indigeneity, Ethnicity, and Federalism," p. 378.

[81] Notably, articles 124 and 125 of the 1979 constitution (and, later, articles 133 and 134 of the 1999 constitution) providing incentives for presidential candidates to appeal for support from various parts of the federation in order to be elected. I was in Lagos as sections 124 and 125 were being considered and counseled a delegation to the Constituent Assembly concerning these territorial distribution requirements for election.

[82] 1979 Constitution of Nigeria, as amended, art. 277(1).

the right of a person to "participate fully in the public life" of a state, no matter how long he or she had resided there, if none of that person's parents or grandparents was an indigene.[83] The objection was prescient.

When the matter reached the Constituent Assembly, which finalized the draft, its members, envisioning future political careers, had already surmised that their state-level bases "should be insulated from non-indigenous competition."[84] In fact, the Constituent Assembly chair "announced that the issue would be referred to the legal draftsman 'so as to ensure that "belong" means the son of the soil of that particular State,'"[85] which is exactly what happened. And so, while the language of articles 14(3) and 14(4) of the 1979 and 1999 constitutions, lacking any mention of indigenousness, might admit of a much more generally liberal interpretation than that of the clearly restrictive formula for the composition of the federal cabinet, it was understood, though not explicitly stated in the text, that indigeneity was the authoritative principle of full inclusion and exclusion for an array of opportunities at the state level and perhaps right down to the now 774 local government areas. Unlike the cabinet requirement, the leakage downward has no constitutional sanction in the text, but it does in the history of constitutional deliberation and the intention of the framers, going back to the 1979 constitution.

Although there were proposals between the adoption of the 1979 constitution and its ultimate replacement in 1999 to make provision for equal citizenship rights for long-term residents of a state who did not belong to the official indigenous group, these proposals gained no traction[86]—with an exception to be noted shortly—so entrenched were the interests set in motion by the indigeneity principle.

The result is an extensive system of discrimination against non-indigenes in several important spheres of state and local activity, ranging from land ownership to eligibility for admission to educational institutions and scholarships (sometimes including reduced school fees), access to public employment, government contracts, and other governmental benefits and amenities. Soon after the 1999 constitution came into force, there was further movement in the states to enforce the indigeneity principle. In 2000, Plateau and, in 2002, Kaduna states purged their non-indigenous civil servants. In an immediate and concrete way, the economic fortunes of individuals and their ability to seek those fortunes where they choose to live depend on their ability to obtain an indigeneity certificate.

[83] Quoted in Bach, "Indigeneity, Ethnicity, and Federalism," pp. 377–78.
[84] Ibid., p. 378.
[85] Quoted in ibid.
[86] See ibid., p. 379.

The body created to implement the new system of preferences was the Federal Character Commission, which was accorded extensive powers and a mandate to "work out an equitable formula"[87] for staffing the federal government services and to take action to "promote, monitor, and enforce compliance with the principles of proportional sharing of all bureaucratic, economic, media and political posts at all levels of government."[88] Although this mandate may seem to authorize a general system of ethnic preferences or quotas to facilitate wide participation, which it does, that is not its only effect. In practice, it also authorizes a more rigid system of crudely determined inclusions and exclusions across the country.

The Commission, established in 1996, allows states and LGAs very great leeway to decide who is indigenous to their territories,[89] leeway that they often utilize to the fullest. The Federal Character Commission (FCC) Act allows the Commission to issue regulations defining who can be considered an indigene of a state.[90] The FCC regulations that were adopted actually departed from the "belonging to" clause in the constitution when they defined an indigene of a local government as a person "(i) either of whose parents or any of whose grandparents was or is an indigene of the Local Government concerned *or (ii) who is accepted as an indigene by the government*."[91] Undoubtedly, this language in the alternative was intended to make it possible to undo some of the discriminatory outcomes mandated by the constitutional definition, at least in favor of long-term residents of a state or LGA.

In crafting the more liberal language, the FCC may have been encouraged by the admonition to "work out an equitable formula" and the seemingly flexible "proportional sharing" language of the Commission's constitutional charter, despite the rigidly ancestral definition of indigene in the same constitution, which cuts in the opposite direction. Whatever the precise source of the alternative, "accepted-as-an-indigene" language, the result in the states and LGAs has been disappointing on several fronts.

[87] 1999 Constitution of Nigeria, as amended, art. 153(c); Third Schedule, part C, sec. 8(1)(a). The formula is "subject to the approval of the National Assembly."

[88] Ibid., Third Schedule, part C, sec. 8(1)(b).

[89] Leila Demarest, Arnim Langer, and Ukoha Ukiwe, "Nigeria's Federal Character Commission: A Critical Appraisal," *Oxford Development Studies*, Vol. 48, no. 4 (2020), pp. 315–28. The "critical appraisal" relates to the Commission's failure to achieve specified goals of representation, not to practices that discriminate against non-indigenes, although the two are related.

[90] Government of Nigeria, Federal Character Commission (Establishment, etc.) Act, no. 34 of 1996, sec. 17(2)(k).

[91] Federal Character Commission, "Guiding Principles and Formulae for the Distribution of All Cadres or Posts," www.fccnigeria.org/GuidingPrinciples.htm, sec. 10, quoted in Philip Ostien, "Jonah Jang and the Jasawa: Ethno-Religious Conflict in Jos, Nigeria," *Muslim–Christian Relations in Africa*, www.sharia-in-africa.net/pages/publications.php, August 2009, p. 4 (emphasis supplied).

The FCC's permissive language has licensed arbitrariness. Certificates of indigenousness are issued by LGAs, and applicants can be turned away for numerous reasons. Philip Ostien points out that many long-resident settlers and their descendants, born in the state, are ineligible for an indigenousness certificate where they reside and also ineligible in their state of origin because of long absence.[92] In addition, standards for issuance of a certificate can change after local elections flip the ethno-political identity of the issuing authority.[93] Standards vary over time and among jurisdictions. According to the then-governor of Bauchi state,[94] five years' residence suffices, but in Plateau state, only an ancestral indigene is eligible for a certificate. In Oyo state, non-indigenes are eligible to apply, but they need not, because in Oyo all civil servants are actually indigenes nonetheless. And in Plateau, issuance is forbidden to long-resident—indeed, sometimes multi-generationally resident—Hausa, who nevertheless frequently manage to procure certificates in an LGA of Plateau state where they are in the majority.[95]

Wherever a certificate determines a large part of an individual's fate, false certificates will appear. Arbitrariness in issuance is rampant, and forged certificates are abundant, as we saw with *mulki* certificates in Andhra Pradesh. Corruption in the procurement of certificates in Nigeria is commonplace. Wealthy Nigerians are said to possess proof of multiple indigenous identities, facilitating their ability to do business across LGA and state boundaries,[96] while, for others, interstate and inter-LGA mobility, so important to economic development, are impeded.

In the process, faith in the good intentions and judgment of government authorities is undermined. Ancestry becomes an outsized determinant of the life chances of citizens, who are confronted with an array of unequal fates stemming from their own governments, despite constitutional professions of equal treatment. And, as we have already seen, some groups engage in murderous violence in order to assert or defend their claims to locally preferred status.[97] The indigenousness standard is a prescription for conflict

[92] Ostien, "Jonah Jang and the Jasawa," p. 10. We shall encounter a case involving this species of double exclusion shortly.

[93] Ibid., p. 13.

[94] Quoted in John Boye Ejobowah, "Ethnic Conflict and Cooperation: Assessing Citizenship in Nigerian Federalism," *Publius*, Vol. 43, no. 4 (2013), pp. 728–47, at p. 743.

[95] Laurent Fouchard, "Bureaucracy and the Politics of Identification in Nigeria," in Séverine Awenengo Dalberto and Richard Banégas, eds., *Identification and Citizenship in Africa* (New York: Routledge, 2021), pp. 185–202.

[96] Aaron Sayne, "Rethinking Nigeria's Indigene–Settler Conflicts," USIP Special Report no. 311, Washington, DC, United States Institute of Peace, July 2012, p. 3.

[97] Sayne states that fighting had displaced more than six million Nigerians over the course of six years, and deaths in violent episodes in Plateau and Kaduna states numbered in the thousands. Ibid., p. 2.

rather than its alleviation. Put crudely, that small, invisible piece of the Nigerian constitution, as currently applied, provides incentives for collectivities of citizens to fight each other.

The indigenousness rules and their application are not to be equated with more modest preferential or affirmative action policies, in which applicants from certain deprived or underrepresented groups may benefit from preferences that may leave others at a disadvantage in one domain or one application process, without necessarily foreclosing all other opportunities. By contrast, Nigeria's indigenousness regime authorizes multiple exclusions from the benefits of full citizenship that have profoundly pernicious effects on the fortunes of millions of people. That regime has created deeply vested interests in designated sets of beneficiaries, including the political class, and a constitution that is internally contradictory.

There have been periodic attempts to alter the policies. The most ambitious was the proposal in 2002 by the Citizens' Forum for Constitutional Reform to include new sections on residency rights in the text of the constitution itself.[98] As early as 1987, the Political Bureau, a commission appointed by the then-military government, after a candid review of Nigeria's many ethnic grievances, criticized the state-level discriminatory treatment of non-indigenes in employment, education, and social services. The Bureau recommended "FULL RESIDENCY RIGHTS, equivalent to those of indigenes" for Nigerians wherever they live, provided they meet a minimum 10-year residency requirement in the state.[99] The government's response was initially favorable, but no changes followed, even for such a lengthy residence period.

In 2011, President Goodluck Jonathan proposed a constitutional amendment to replace the indigenousness standard altogether with a residency requirement, which would have produced a radical change all at once. The proposal was not considered by the National Assembly.[100] Multiple proposals to allow as few as 5 years' residence or as many as 25 years to qualify for indigene status have likewise fallen by the wayside, as have attempts to resolve the particular problem of discrimination against women from other states married to indigenes of their states of residence but who are considered

[98] See the Forum's "Memoranda Submitted Presidential Committee on Provisions for and Practice of Citizenship and Rights in Nigeria," Lagos, 2002, pp. 9–19. I am indebted to Rotimi Suberu for this reference.

[99] Federal Republic of Nigeria, Report of the Political Bureau, March 1987 (Abuja: Directorate for Social Mobilization, 1987), pp. 199–205, at p. 200 (capitalization in the original).

[100] Ejobowah, "Ethnic Conflict and Cooperation," p. 741.

as indigenous only to their states of birth.[101] In 2018, a 23-member presidential committee, acknowledging the widespread discrimination against non-indigenes, proposed that anyone domiciled in a state should be considered indigenous to it, but no action was taken on the recommendation.[102] The Nigerian press and scholarly publications are full of articles complaining of injustices perpetrated by the definitions of the FCC, and many high officials claim to want to liberalize the system,[103] but to no avail.

Despite the passage of decades, the Nigerian courts, so adept at delineating the boundaries of federal and state power, have rarely adjudicated the legality of the application of the indigeneity principle to states and localities or the conflict of that principle with guarantees of equality and freedom to reside anywhere in the federation. There have been some attempts to litigate such questions.

The most important was a challenge by numerous LGA employees to an order by the Lafia LGA in Nasarawa state, responding to a policy declared by the state's Local Government Service Commission, to transfer them to their "LGA of origin." That LGA refused to accept them on the ground that they were not indigenous, having resided for so long in the LGA from whose employment they had just been transferred. The High Court rejected their challenge, but, given their obviously unfair rejection by both LGAs, the Court of Appeal and the Supreme Court both had no difficulty in finding unanimously that their reassignment was a violation of article 42(1) of the constitution forbidding discrimination on grounds of ethnicity or place of origin.[104] Neither court confronted the widespread practice among LGAs of discriminating among entry-level applicants based on indigeneity or its

[101] Ibid., p. 743. See Abdul Raufu Mustapha, "Institutionalising Ethnic Representation: How Effective Is the Federal Character Commission in Nigeria?" Oxford, CRISE Working Paper no. 43 (June 2007), p. 17. In 2014–15, a constitutional amendment to allow non-indigenes with 10 years of residence in a jurisdiction to enjoy the same rights as indigenes was approved by the required supermajorities in the National Assembly and in state legislatures, but all amendments approved in that cycle were vetoed by the president, apparently for reasons not pertinent to the indigenousness issue. Personal communication by email from Rotimi Suberu, March 9, 2023. In 2020, a bill to amend the constitution to permit women from other states to stand for election in a state in which their husband is an indigene was introduced in the Senate. Senate of Nigeria, SB 324, C1661. Another bill, much more far reaching, to amend the key articles pertaining to indigenousness in order to allow Nigerian women indigenous status after five years of marriage to an indigene of a state and, more fundamentally, to create a process to establish indigenous status by application for those who have resided in a state for at least 10 years, was tabled. Senate of Nigeria, SB 323, C1659. The bill would abolish the ancestral criteria of article 318 to establish indigenous status and would substitute birth in the state or those new 10-year residence requirements. Both bills were referred to a committee on constitutional amendments. Somewhere along the way, they appear to have died.

[102] See www.ripplesnigeria.com/restructuring-12-unforgettable-points-of-the-el-rufai-report-rotting-away-in-apcs-cupboard.

[103] Rotimi Suberu, "Ethnic Inequality, the Federal Character Principle, and the Reform of Nigeria's Presidential Federalism," WIDER Working Paper no. 2022/113 (UN University), October 2022, pp. 11, 15.

[104] *Lafia Local Government v. Governor of Nasarawa State*, [2012] 17NWLR 94 (Sup. Ct. 2012).

putative support in the drafting history of the constitution. The thrust of the multiple opinions in the case offered no constitutional warrant for the practice.[105] All five justices of the Supreme Court bench flatly declared the state's Local Government Service Commission order requiring the transfer to be unconstitutional.

For some years, that decision stood alone. In another case, 21 plaintiffs, all non-indigenes of various states and local governments, contested their classification as non-indigenes and their consequent exclusion from equal rights to education, employment, public service, property ownership, and infrastructure provision. This very broad challenge to the indigeneity regime was dismissed on procedural grounds in the High Court of Kaduna in 2011,[106] and there seems to be no record of any appeal.

After several years, two additional cases of mass transfers of non-indigenous state employees appeared, both from Abia state in the Southeast. In the first, several employees brought suit in the Industrial Court of Nigeria, claiming the transfers of 460 state civil servants to their states of origin in 2011 violated the non-discrimination provisions of article 14 of the Nigerian constitution.[107] In a strongly worded decision, the Industrial Court agreed that the state's action constituted unlawful discrimination based on "place of origin," a ground forbidden by section 42(1)(a). And then, seemingly unaware of the constitutional history of the indigenousness provision and its echo at the state and LGA level, the court went on to declare that "non-indigene" is a term not "recognized in the lexicon of the Nigerian Constitution."[108] It also recognized that ethnic discrimination, which it saw at the root of the transfers, constitutes "differentiation that the Constitution abhors."[109] A subsequent case, in a different division of the Industrial Court but arising from the same transfers, also found the practice unconstitutional.[110]

Thus far, in spite of the unequivocal holdings of the unusually egregious employee-transfer cases, the indigenousness regime has survived. Nevertheless, the courts are not eager to enforce the regime, which causes considerable hardship but whose judicial undoing could cause unforeseeable catastrophic

[105] The explicit language of the constitution on indigenousness extends merely to the federal cabinet and the status of persons in a state, not their status in an LGA, but an LGA is a subordinate body of the state government. See 1999 Constitution of Nigeria, as amended, arts. 147(3), 318(1).

[106] *Garba & Ors v. Federal Attorney General & Ors*, www.ihrda.org/2013/09/adamu-garba-and-20-ors-v-federal-attorney-general-of-nigeria-and-13-ors.

[107] *Njoku Fidelia Ada & Three Ors v. Attorney General of Abia*, www.nicnadr.gov.ng/judgement details.php?id=5109&party=NjokuFideliaAda&3Ors-VS-AttorneyGeneralofAbiaState&2Ors (Industrial Ct., Owerri Div., 2020).

[108] Ibid., paragraph 43.

[109] Ibid.

[110] *Oguamanam Ann Dibugo v. Governor of Abia & Ors*, www.nicadr.gov.ng/judgement/details.php?id=7694 (Industrial Ct., Port Harcourt Div., 2023).

consequences. States and LGAs sometimes compel non-indigenes to "return" to homes they have never seen. It is often difficult for non-indigenes of a state or LGA to stand for election in areas in which they have long been resident and in which they can usually vote. In a case raising a question of eligibility to become candidates as a result of a party primary election for a Senate candidacy, the candidate with the second-highest vote total challenged the victory of the candidate with the largest number of votes on the ground that the winner was an indigene of an LGA that lay outside the boundary covered by that Senate seat. The Supreme Court held unanimously that being an indigene or resident of a senatorial district is not a requirement to contest. The constitution, declared the court, lists the required qualifications, and neither indigenousness nor local residence is among them.[111]

The Court of Appeal was able to avoid pronouncing on a claim of pro-indigenous discrimination in a case brought by a failure of a state legislature to confirm as chief justice a non-indigene of the state who had been duly recommended by the Judicial Council and whose nomination had been forwarded to the House of Assembly. When the House declined to confirm her appointment, she brought suit. Sifting through the legislative committee reports, the High Court found no evidence of discrimination. The Court of Appeal went further in holding that the House resolution, not the work of the committees, was decisive, and the House had unfettered discretion to confirm or refuse to confirm the appointment. The court would not inquire into the motives of the legislature.[112]

There the issue of indigenousness stands, in all its constitutional ambiguity, with most courts and politicians no doubt understanding that the constitution speaks with a forked tongue on the matter, and yet neither able to resolve the problem, but mostly able to avoid confronting it squarely. By contrast, it is quite clear that discrimination on grounds of religion is impermissible under the constitution.[113] Were it not for the confounding question of indigenousness, so would be discrimination on the basis of ethnic identity, with which it is very often intertwined. But, apart from the mass transfer cases—and we have only viewed those that have been litigated, so others may have survived—the indigenousness standard does indeed limit the provision of rights and opportunities under the Nigerian constitution.

[111] *Nwaogu v. Atuma & Ors*, [2013] 11 NWLR 117 (Sup. Ct.). See 1999 Constitution of Nigeria, as amended, art. 65(1). Interestingly enough, the Court of Appeal has held that the compliance of a political party with zoning requirements in a party constitution that apportions candidacies for various offices, in order to achieve overall geographic balance of the slate of candidates by area of the country from which the candidates originate, is a justiciable issue. *SDP & Ors v. Gana & Anor*, [2019] LPELR 47177 (Ct. App.).

[112] *Edun & Ors v. The Speaker, Cross River State, & Ors*, [2020] LPELR 51999 (Ct. App.).

[113] *Abdulkareem v. Lagos State Government*, [2016] 15 NWLR 177 (Ct. App.), affirmed by a divided Supreme Court, June 17, 2022, downloadable slip opinion available at thenigerialawyer.com, July 18, 2022.

What is truly extraordinary is the reach of the indigenousness standard at the state and local level, where it is not explicitly authorized but only implied in the constitution. Undoubtedly, it was intended to have *some* unspecified effect inside states and LGAs, but that is not the same thing as according carte blanche to those authorities to treat non-indigenes in any way they please. Courts need to have a role in specifying the limits or demanding that the federal legislature do so.

After all, the rights articles of the Nigerian federal constitution purport to specify an expansive provision of equality of citizens, which Supreme Court decisions state is to be liberally construed. Yet an article in the same document also implies—or has been construed retroactively to imply—an extensive regime of privileges and disabilities based on birth categories expressly forbidden by the constitution. Bearing in mind the sequence of events that led up to the Biafra war, the history of those privileges and disabilities makes clear that they were initially intended to foster equal representation and prevent the monopolization of opportunities by some groups at the expense of others,[114] but the effect of a single breathless mention of "indigenes" is to promote precisely such unequal monopoly advantages in multiple spheres at the state and local level. How long this contradiction can survive is unknown, but its costs in economic inefficiency, in personal hardship, and even in violent death persist.[115]

Constitutional Sources of Dual-Class Citizenship

It is extraordinary how easily the three countries just reviewed fell into creating two classes of citizens at the state level. They did so because of three different histories, each of which gave rise to a different set of exclusionary practices.

In Ethiopia, the armies that overthrew the Mengistu regime were ethnic armies. In reaction to the supremacy of the Amhara people of Emperor Haile Selassie and the regime of the Derg that, having overthrown the emperor, was still an Amhara regime, the regime that succeeded Mengistu Haile Mariam in 1991 styled itself as one of equal ethnic groups or nationalities (the term it preferred). The constitution it installed described the country in the same

[114] And to support the growth of national, rather than ethnically based, political parties, for if the cabinet had to be composed of people from all states, it would undoubtedly be necessary for the president's party to be similarly composed. Other provisions of the constitution contemplate or require the same. 1999 Constitution of Nigeria, as amended, arts. 133(b), 222(b), 223(1)(b).

[115] For an intriguing remedial proposal through the use of federal incentives to induce states and LGAs to diversify their economies, which would make the contributions of non-indigenes more valuable and thus more welcome, see Ejobowah, "Democracy, Ethnicity and the Instability Problem," pp. 13–16.

way, and, as we have seen, the interests of the main nationalities took precedence over those of the numerous groups located among them. Within states, the guarantees of ethnic equality that had been adopted became mere boilerplate in the face of minority hardship.

In contrast, India's protections for Scheduled Tribes followed upon protections created by the preceding colonial regime. The Sixth Schedule adopted the innovation of the autonomous council, with its provisions for reserved seats for members of Scheduled Tribes, whose majority on the council could and does impose multiple disadvantages upon non-members of a Scheduled Tribe ruling in a given area.

Nigeria's creation of indigenes and non-indigenes in individual states was the accidental byproduct of the attempt to require an ethnically heterogeneous federal cabinet. Once created, the two categories could confer vastly unequal rights and privileges right down to the local government level.

Quite obviously, very different motives underlay the origins of differential schemes of rights prevailing in the federal units of the three countries. In each case, however, their constitutional status has proved to be exceedingly durable and especially resistant to change. In each, inclusion or protection was intended, but in each exclusion was the result.

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7
Discrimination Despite Design

Self-Inflicted Wounds

By contrast with Ethiopia, India, and Nigeria, there are no constitutional provisions in Malaysia, Indonesia, or Kenya that authorize, whether deliberately or otherwise, the kinds of ethnic discrimination experienced by minorities at the devolved level. I previously mentioned Malaysia's federal affirmative action regime, experienced by non-Malays as discriminatory, so the "ethnic discrimination" I refer to in Malaysian states is religious discrimination affecting non-Muslims at the state level. It arose from a persistent misinterpretation of a constitutional amendment adopted decades after independence. Indonesia's constitution provides no support for ethnic or religious discrimination in devolved units, but its courts have been unreliable in constitutional enforcement. Kenya's constitution provides abundant and unequivocal protection against discrimination, but its courts adhere to procedures that make determinations of unlawful discrimination difficult to reach. The failures in these cases are more institutional than constitutional in character.

Malaysia's Problem of Constitutional Fidelity

Like Nigeria, Malaysia developed a serious problem of a constitutional provision that lent itself to discrimination against minorities within states. Unlike Nigeria's problem, however, Malaysia's could easily be alleviated by more faithful judicial interpretation, particularly of the relation of Syariah (Malay for Shariah), a state subject under the constitution, to the overall regime of constitutional rights.

The Malaysian judiciary has never enjoyed as much freedom of action as the Indian Supreme Court, and it has sometimes been more reticent about using its powers than the Nigerian judiciary has. Beginning in the 1980s, the independence of Malaysia's courts had been challenged and pressured by the executive. In 1988, the senior judiciary suffered a major blow when, in order to avert a potential loss in a case involving intraparty factional differences, the

prime minister suspended the Lord President of the highest court, whom the prime minister had been given reason to think might rule against him. Five other judges, who had then stayed the proceedings against the Lord President, were also suspended, and two of them were eventually removed from their positions, as was the Lord President.[1] The Malaysian judiciary did not recover its complete independence from the executive for quite some time. With notable exceptions, some of its judgments in the next decades revealed a generally pro-government orientation.[2]

The Malaysian federal system, I have noted, is heavily weighted in favor of the powers of the central government. As mentioned earlier, Syariah, and especially the personal law and family law of Muslims, is a state subject under the federal constitution, and only Muslims are subject to the jurisdiction of the Syariah courts.[3] The civil courts have had occasion to define the boundaries between federal and state power, even in controversial cases.[4] They have also been actively involved in adjudicating issues involving religious rights and freedoms.

A few examples can make this clear. With some exceptions, state religious authorities have generally made it difficult or impossible for a Muslim to leave the Islamic faith. In civil marriages of non-Muslims, in which a husband later converts to Islam, the states allowed the husband to convert his minor children to Islam and accorded him custody without requiring the assent of their non-Muslim mother. Islamic authorities in some states have imposed restrictions on churches, demanding, for example, that they remove their crosses and forbidding Malay-language editions of the Christian Bible or other religious books from using the word "Allah" for God.[5] Some state governments have required the closure of certain shops on Muslim holidays, particularly food shops during the Muslim fasting month, or shops selling alcoholic beverages. Some state or local authorities have required Hindu temples to relocate, because their proximity to mosques or to Muslim neighbors had caused upset to the local Muslim population or, occasionally, was said to have provoked violence. All such controversies implicate the religious freedom rights embedded in the constitution, and quite a few have resulted in

[1] Harding, *The Constitution of Malaysia*, pp. 207–16. For the Lord President's memoir, see Salleh Abas, *May Day for Justice: The Lord President's Version* (Kuala Lumpur: Magnus Books, 1989). See also the account by one of Salleh's lawyers, later the attorney general of Malaysia, Tommy Thomas, *My Story: Justice in the Wilderness* (Petaling Jaya: SIRD, 2021), pp. 98–124.

[2] See Harding, *The Constitution of Malaysia*, p. 216.

[3] 1957 Constitution of Malaysia, as amended, Ninth Schedule, List 2, part 1.

[4] See, e.g., *Iki Putra bin Mubarrak v. Kerajaan Negeri Selangor*, [2021] 2 MLJ 323 (Fed. Ct.); *Mamat bin Daud v. Government of Malaysia*, [1988] 1 MLJ 119 (Sup. Ct.).

[5] Despite the uncontroversial prevalence of that very linguistic usage among Christians in the Arab Middle East, Indonesia, and elsewhere.

litigation to vindicate the rights of religious minorities. Many such cases have long histories in the courts.

In cases of this kind, the civil courts, believing that article 121(1A) foreclosed their jurisdiction,[6] failed to intervene, despite the fact that the Syariah courts have no jurisdiction over non-Muslim parties. The absence of jurisdiction over non-Muslims means, of course, that no issue in a case involving a non-Muslim could be confided to the Syariah courts, and so civil courts were not precluded from asserting jurisdiction. In cases involving the right of a Muslim to leave the faith, however, the Federal Court decided that this matter was within the jurisdiction of state Syariah courts.[7]

In *Lina Joy v. Majlis Agama Wilayah Persekutuan*,[8] a Malay woman sought to have her designation as a Muslim on her identity card removed because she had converted to Catholicism. Without official evidence of her conversion, presumably to be provided by the Syariah court, the registration authorities declined. As a non-Muslim, however, she would no longer be within the jurisdiction of the Syariah court.

Defeated in the civil trial court in her challenge to this decision, she pursued appeals. Treating her case as merely a challenge to an administrative decision, the Court of Appeal decided the authorities' denial of her application was not unreasonable, thereby avoiding the question of whether she had an absolute right to change her religion under articles 3 and 11 of the constitution.[9] A majority of judges in the Federal Court did not, however, avoid this question, declaring instead that the right of a Muslim to leave the faith was dependent on her ability to procure a certificate of apostasy from the relevant Syariah court in whose jurisdiction she resides. As she could not procure such a document, her claim was defeated. This, notwithstanding the provision in article 3(4) of the constitution that "nothing in this article," including the provision making Islam "the religion of the Federation," derogates from any of the rights specified elsewhere in the constitution. The dissenting judge pointed out that the Syariah statutes in the jurisdiction in which the applicant resided had no procedure for adjudicating apostasy or certifying conversion, so the applicant was asked to procure a nonexistent document—hence clear evidence of the unreasonableness of the administrative action.[10]

[6] Recall that this article precludes jurisdiction of the High Court and inferior civil courts over "any matter within the jurisdiction of the Syariah courts."

[7] The Federal Court, which was for a time called the Supreme Court, is Malaysia's highest court. The High Court is a trial court, as it is in Britain and most of its former colonies.

[8] [2007] 4 MLJ 585 (Fed. Ct. 2007).

[9] [2005] 6 MLJ 194 (Ct. App.).

[10] For an excellent discussion of the case and its implications, see Matthew J. Nelson and Dian A. H. Shah, "Operationalizing and Regulating Religious Freedom: Apostasy and Administrative Reasonableness in Malaysia and Beyond," *International Journal of Constitutional Law*, Vol. 16, no. 4 (2018), pp. 1293–321.

Lina Joy's case was not the first or the last to make conversion from Islam difficult in Malaysia, but it stimulated contentious and far from uniformly civil debates about religious freedom, sometimes edging over into threats by extremists against apostates. (Lina Joy herself eventually felt obliged to move to Australia.) As I mentioned, contention was also stimulated by cases involving unilateral conversion of his minor children to Islam by a husband who had converted to Islam but was married to a non-Muslim wife who did not convert. Typically, the conversion of the children occurred without the knowledge of the wife, who was their mother. When the husband left the house or the marriage was dissolved, the status and custody of the children was contested. In such a case, the Federal Court decided that a provision of the constitution confiding authority to decide on the religion of a minor child to the parent or guardian permitted the husband to convert such a child without the consent of the wife.[11]

A similar result followed in the Court of Appeal in the case of *Padmanathan Krishnan v. Indira Gandhi Mutho*,[12] in which an Indian couple had been married in a Hindu ceremony but the husband later converted to Islam and then converted their three children. The wife challenged the conversions without her consent, but the Court of Appeal, reversing a High Court judgment in her favor, held that conversion to Islam was exclusively in the jurisdiction of the state Syariah officials. As the Syariah courts had no jurisdiction over non-Muslims, she had no ability to challenge the conversions there; and, as article 121(1A) provided that the High Court had "no jurisdiction in respect of any matter within the jurisdiction of the state Syariah courts,"[13] the wife was believed to be unable to secure relief in the civil system either.[14]

Indira Gandhi Mutho found herself in a dilemma in which the parental rights she asserted over her minor children could neither be enforced nor even adjudicated anywhere. This problem, created by the interpretation of article 121(1A) to exclude adjudication of claims by non-Muslims arising out of civil statutes or the constitution when any Syariah issues were involved, was

For a subtle treatment of apostasy and conversion cases, and others implicating religious freedom, see Dian A. H. Shah, *Constitutions, Religion and Politics in Asia: Indonesia, Malaysia and Sri Lanka* (Cambridge: Cambridge University Press, 2017).

[11] *Subashini a/p Rajasingam v. Saravanan a/l Thangathoray*, [2008] 2 MLJ 147 (Fed. Ct.). The constitutional provision in question uses the singular "parent." 1957 Constitution of Malaysia, as amended, art. 12(4). But see note 16.

[12] [2016] 1 CLJ 911 (Ct. App.).

[13] 1957 Constitution of Malaysia, as amended, art. 121(1A).

[14] But if the Syariah court had no jurisdiction over non-Muslims, how could it be thought that the matter was "within the jurisdiction" of that court, so as to preclude civil court jurisdiction pursuant to article 121(1A)?

well known to have caused results that discriminated against non-Muslims as they attempted to secure their rights.

Bear in mind, however, that article 121(1A) deprived only High Courts and inferior courts, but not the Court of Appeal or the Federal Court, of jurisdiction over matters properly before the Syariah courts. Indira Gandhi took an appeal to the Federal Court, which, in a decision rendered nine years after the events in litigation had taken place, reversed the Court of Appeal and unanimously held that 121(1A) was no bar to the adjudication of her claims in the civil appellate courts.[15] Judicial review is part of the unamendable basic structure of the constitution, and is lodged in the civil courts, declared the court in a sweeping decision. Having asserted jurisdiction, the Federal Court then decided that the conversion of the children was not executed in accordance with the relevant state Syariah statute and, most significantly, that unilateral conversion contravenes the constitutional provision that accords both parents the right to determine the religion of their children.[16]

The *Indira Gandhi* case was not only a landmark in its impact on unilateral conversions but also in its broader impact on litigation in which interpretation of 121(1A) might vest jurisdiction in Syariah courts and thereby prevent non-Muslims from seeking redress of discriminatory action. As noted earlier, Syariah law is state law in Malaysia, and Syariah courts are state courts, although a federal Department for Islamic Development (known by the acronym JAKIM) tends to have considerable influence over the policies adopted by its state counterparts in Syariah administration.

A number of Malaysian states have prohibitions in their Syariah statutes on the use of the word "Allah" by Christians. Since Syariah jurisdiction does not extend to non-Muslims, these prohibitions would not be enforceable, even if they were not constitutionally questionable on free speech and freedom of religion grounds. That, however, does not mean that there have not been attempts to enforce them, some by the federal government and some by state Islamic authorities.

In 1986, the federal Home Ministry issued a directive forbidding the use of the word "Allah" in all Christian religious publications. Christian churches with Malay-speaking congregations, mainly from the two Borneo states, had habitually used Allah in their Malay-language services, and their Bibles

[15] *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak*, [2018] 1 MLJ 545 (Fed. Ct.). Four of the five judges on the panel were Muslims.

[16] Although that article, 12(4), uses the term "parent," the Court cited the constitution's Eleventh Schedule, on rules of constitutional interpretation, to the effect that the singular includes the plural, and the Guardianship of Infants Act 1961, as amended, sec. 5, which provides for equality of both parents in the upbringing of their children.

contained the word as well. In 1988, the state of Selangor had passed a Non-Islamic Religions (Control of Propagation Among Muslims) Enactment,[17] which made it an offense for a non-Muslim to use any of the prohibited words that the act declared would be exclusive to Muslims. One of those words was "Allah." In 2007, the Home Ministry warned a Catholic newspaper, *The Herald*, that it would lose its publishing permit, which had been issued on condition that "Allah" not be used, unless it dropped the word from its Malay-language version.

The Catholic archbishop was victorious in the trial court in a suit challenging the ban but lost on appeal in a judgment replete with language about the "sanctity of Islam" under the federal constitution,[18] the need to avoid "confusion" among Muslims, and concern about religious violence and disorder, some of which had erupted as a *result* of the High Court's decision on religious freedom grounds. The Court of Appeal thereby turned the constitutional shield in article 3 for non-Muslim religious practice "in peace and harmony" into a sword in the hand of those who sought to disturb it. And, finally, the court determined, based upon its own internet research, that the word Allah was not "integral" to the Christian religion and could therefore be forbidden.[19] Leave to appeal was denied by the Federal Court, but with three dissents, all of which reflected serious disagreement with the approach of the Court of Appeal to the freedom of religion questions the case raised.[20]

For quite some time, apparently, Malay-language Bibles and compact discs containing the word Allah had been seized at airports as they were being imported by Christian citizens, but the most intrusive event took place at the state level outside Kuala Lumpur in 2014 as the Allah case was being decided. Officers from the Selangor state Islamic Religious Department raided the offices of the Bible Society of Malaysia in that state and seized hundreds of Bibles containing the prohibited word and, with the help of secular police, compelled two officials of the Bible Society to make statements at police headquarters.[21] The raid caused great consternation among the non-Muslim public and Muslims concerned about constitutional rights as well.

[17] Selangor Enactment no. 1 of 1988. Cf. 1957 Constitution of Malaysia, as amended, art. 11(4), allowing state and federal restrictions on religious proselytization among Muslims.

[18] There is no provision concerning the sanctity of any religion in that constitution.

[19] *Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri*, [2009] 2 MLJ 78 (High Ct.), rev'd sub nom. *Menteri Dalam Negeri v. Titular Roman Catholic Archbishop of Kuala Lumpur*, [2013] 6 MLJ 468 (Ct. App.).

[20] *Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri*, [2014] 4 MLJ 765 (Fed. Ct.).

[21] *Star* (Petaling Jaya), January 2, 2014.

Months later, the federal attorney general decided there were no grounds for prosecution and ordered that the Bibles be returned,[22] as did the state government to which the state Religious Department reports,[23] but to no avail.[24] The state Islamic authorities have no jurisdiction over non-Muslims—hence their need to ask the federal authorities to prosecute—and there is little doubt that the intrusion into the Bible Society and the seizure of Bibles were both *ultra vires*.[25]

How these actions and these judicial decisions could have come to pass in the face of the extensive protection for religious freedom contained in the constitutional provisions reviewed above is a question that grows more intriguing in the light of the drafting history of those provisions. The original understanding is not in doubt. The constitution was produced by a British commission with members from Commonwealth countries. The coalition that had formed the elected government two years before independence submitted a memorandum to the Commission asking for a clause making Islam "the religion of the Federation." That initial memorandum stated: "The observance of this principle shall not impose any disability on non-Muslim nationals and shall not imply that the State is not a secular state."[26] The Commission was unreceptive to the proposed clause, but one member, a judge from Pakistan, supported the idea, declaring it "innocuous."[27] Still, the Commission's draft did not include it.

The clause was, however, inserted in the review stage of that draft, at which time it was stated clearly that the clause would have only symbolic significance. Tunku Abdul Rahman, the first prime-minister-in-waiting, assured the reviewing committee that the state would be secular. In that context, the safeguards for the profession and practice of other religions, contained in article 11, were inserted as a matter of reassurance. When the final draft was prepared in London, the Malayan delegates assured the Colonial Office "that they had no intention of creating a Muslim theocracy and that Malaya would

[22] *Malaysian Insider*, June 11, 2014.

[23] At least nominally, but the federal Department for the Development of Islam (JAKIM) exercises quite a bit of influence over its state counterparts.

[24] *Malay Mail*, June 14, 2014.

[25] I was residing in Selangor at this time, and the raid was widely regarded as a shocking breach of interreligious relations and of religious freedom guarantees.

[26] Alliance Memorandum to the Reid Commission, September 27, 1956, C.O. 889/6, quoted in the Report of the Federation of Malaya Constitutional Commission, 1957 (Kuala Lumpur: Government Press, 1957), p. 73.

[27] Justice Abdul Hamid, quoted in Joseph S. Fernando, "The Position of Islam in the Constitution of Malaysia," *Journal of Southeast Asian Studies*, Vol. 37, no. 2 (2006), pp. 249–66, a thorough exposition of the subject, from which many points that follow in the text are drawn. See also Shah, *Constitutions, Religion and Politics in Asia*, pp. 32–34; K. J. Ratnam, *Communalism and the Political Process in Malaya* (Kuala Lumpur: University of Malaya Press, 1965), pp. 58–63, 117–23.

be a secular state."[28] The same phrase, "secular state," can be found at least four more times, without contradiction, in accounts of the proceedings that followed, leading up to the adoption of the constitution.[29] And three decades later, it was still understood by the judiciary that the constitution provided for a secular state.[30]

With the palpable growth of Islamic sentiment among Malays in the 1980s, which the government, with its dominant Malay-Muslim component, tried to champion and guide, and the upgrading of the Syariah statutes and courts in the 1980s and 1990s,[31] including the amendment restricting civil court jurisdiction over Syariah court matters—and all this combined with the government's influence over the judiciary after the disruptive events of 1988 recounted earlier—legal doctrine and the orientation of judicial personnel began to change. It did not change uniformly, but perceptibly. It began to be possible for judges to deny that Malaysia was a secular state.

After the prime minister, Mahathir Mohamad, declared in 2001 that Malaysia already possessed the attributes of an Islamic state and, implicitly, therefore, that no constitutional change was needed to accomplish such a transition,[32] his two immediate successors affirmed, with less nuance and with faint regard for history, that Malaysia was indeed an Islamic state.[33] So did many Malay politicians of the ruling coalition. In view of this train of events, it should come as no surprise that legal doctrine began to lean in the direction of protecting the special place of Islam in the constitution, while simultaneously contracting the scope of religious freedom.[34]

The injustices created by the custody, conversion, and Allah cases were palpable. In the first, aggrieved parents, usually with their children missing, were locked out of both the secular and religious courts by perverse interpretations of article 121(1A). In the second, Muslim converts to Christianity could not secure a change of religion on their identity card without submitting to apostasy proceedings, which were asserted to lie exclusively in Syariah courts but in many states were altogether nonexistent or, in others, dangerous because

[28] Quoted in Fernando, "The Position of Islam in the Constitution of Malaysia," p. 260.

[29] Ibid., pp. 261–66.

[30] *Che Omar b. Che Soh v. Public Prosecutor*, [1988] 2 MLJ 55 (Sup. Ct.).

[31] See Donald L. Horowitz, "The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change," *American Journal of Comparative Law*, Vol. 42, no. 2 (Spring 1994), pp. 233–93, and no. 3 (Summer 1994), pp. 543–80, an article focused mainly on these Syariah changes in Malaysia.

[32] Mahathir was undoubtedly trying to stay at least one step ahead of pressure from activists within the Muslim community and from an Islamist opposition party. It was also he who initiated the review of Syariah statutes referred to in ibid. Most of the resulting changes had a very liberal cast.

[33] Shah, *Constitutions, Religion and Politics in Southeast Asia*, pp. 74–75.

[34] See ibid., pp. 2, 17, 151–53, 157, referring to language implying the supposed supremacy of Islam in the constitutional scheme.

of the provision of draconian penalties for leaving the faith.[35] In the third, the needless harassment of a church whose Malay-speaking congregants had used the Arabic term for God without incident for many generations, based on the unproven danger of "confusion" leading to proselytization, was plain to see, particularly because the harassment was conducted by state bodies with no legal authority whatever over non-Muslims.

Malaysia has long and rather deep attachments to British traditions of adjudication, which, it turns out, were only in a shallow slumber during the long period canvassed thus far. The Federal Court decision in the *Indira Gandhi* case on child custody, decided in 2018, is merely one in a series of judgments exhibiting a very different constitutional orientation, particularly with respect to the relation of state Syariah legislation to the federal constitution. The newer cases have profound implications for the equality of non-Muslims.[36] In freedom of religion matters, dissenters in the *Herald* case began to shape the law in a very different direction.[37] Consider a small sample.

A woman with a Buddhist mother and a Muslim father had been raised by her Chinese mother as a Buddhist and sought a declaration that she was not a Muslim, in spite of the fact that her father had registered her as such. Such a person would previously have been remitted to the Syariah court, which would have been unlikely to accede to her request, and the lower civil courts did, in fact, deny it. On appeal, however, the Federal Court found that there had been no proof of the marriage of their parents, which, under Syariah rules, divests the father of authority to register the child as a Muslim. The evidence revealed that the child had never lived as a Muslim and, therefore, according to seven of the nine judges, was entitled to the declaration she sought.[38] In the course of the majority judgment, the court declared

[35] See Mohamed Azam bin Mohamed Adil, "Punishment for Apostasy: Conflict between the Right to Freedom of Religion and Criminal Sentence—A Case Study in Malaysia," *Jurnal CITU*, Vol. 1, no. 2 (2005), pp. 177–99, arguing that state punishments for apostasy are contrary to the guarantees of article 4(1) of the Malaysian constitution. A different version appeared in the *Asian Journal of Comparative Law*, Vol. 2, no. 1 (2007), pp. 1–36.

[36] See Justice Dato' Rhodzariah Bujang, "Conversion of Minors: An Uncertainty No More," *Journal of the Malaysian Judiciary*, July 2019, pp. 33–45.

[37] The political environment had also begun to change, as the dominance of the ruling coalition, led by a party conspicuously bent on displaying its "pro-Muslim" credentials, had begun to wane during this period, especially after the 2013 election, in which the coalition won the election but lost the popular vote, and after the 2018 election, in which it lost both. Even earlier, however, there had been more than a bit of ambivalence within the government on some of some of these issues. There had been a cabinet directive in 2009 banning unilateral conversion, but it apparently had no effect on state Syariah courts, and in 2016 a bill had been introduced to that effect, but no action was taken on it.

[38] *Rosaliza bt. Ibrahim v. Kerajaan Negeri Selangor*, [2021] 2 MLJ 181 (Fed. Ct.). A separate opinion by two judges suggested that expert testimony on the Syariah questions should have been sought but agreed that the case was properly in the jurisdiction of the civil courts, notwithstanding article 121(1A). All nine judges agreed that this was not a case of conversion but of the original religious identity of a child in

unequivocally that only the civil courts can decide questions of constitutionality and, implicitly, that Syariah rules could not operate as a system outside the constitution.

Another case, also heard by a full bench of the Federal Court, dealt with Syariah criminal law. It was a challenge to a Syariah statute criminalizing sexual conduct that was prohibited under secular federal law as well.[39] The court held unanimously that there is no power in state legislatures to enact statutes whose subject matter is within the authority of the central government, based on the constitution's Federal List of subjects.[40] That rule applies even if the federal legislature has not legislated upon that subject. By its terms, the decision has no direct effect on religious discrimination, but it makes clear that the reach of Syariah will be strictly limited by the federal constitution, as scrutinized and interpreted by the civil courts. This does have implications for religious discrimination cases.[41]

Given this shift in the law, with respect to constitutional rights and with respect to federalism, the decision in the case of Jill Ireland bt. Lawrence Bill will not be surprising.[42] Ireland, a Melanau Catholic from the Borneo state of Sarawak, had her Malay-language compact discs seized in 2008 as she sought to import them from Indonesia. The discs, focused on Christian themes, had the word "Allah" in them, and the customs officers invoked the Home Affairs directive adopted in 1986, referred to earlier, that forbade their importation. The High Court had earlier found the seizures unlawful but had declined to adjudicate the freedom of religion claims. The Court of Appeal remanded the case for a determination of those claims. On remand, the High Court judge found that the directive was not authorized by the statute that

official records. But see a divided Federal Court decision that a woman converted at age four to Islam by her convert mother was legally a Muslim, in spite of her claim never to have professed the religion of Islam or to have lived as a *Muslim. D v. Selangor Islamic Religious Council*, unreported at the time this book went to press but described in the *Malay Mail*, www.malaymail.com/news/Malaysia/2024/05/03

[39] *Iki Putra Mubarrak v. Kerajaan Negeri Selangor*, [2021] 1 LNS 47 (Fed. Ct.).

[40] 1957 Constitution of Malaysia, as amended, Ninth Schedule, List 1.

[41] See the analysis of Dian A. H. Shah, "*Iki Putra Mubarrak*: Redefining Federalism in Malaysia?" in Renae Barker et al., eds., *Law and Religion in the Commonwealth* (Oxford: Hart, 2022), pp. 123–36. She points out that the same logic might well render Syariah court decisions in matters clearly within their jurisdiction vulnerable to challenge on constitutional grounds; and she cites cases such as *Lina Joy* as among those that, from this perspective, had wrongly abrogated the power of the civil courts, merely because, in addition to constitutional claims, the matter involved some questions within Syariah jurisdiction. Barring some abrupt reversal of legal doctrine, there will likely be no tendency to remit apostasy cases to the many state Syariah jurisdictions in which there are no procedures for recognizing conversion out of Islam or to the few that have processes, such as those in the state of Negeri Sembilan, involving months of reeducation and persuasion in the hope of changing the mind of the apostate.

[42] *Jill Ireland bt. Lawrence Bill v. Menteri Bagi Kementrian Dalam Negeri Malaysia*, [2021] 8 MLJ 89 (High Ct.). The trial judge was a Court of Appeal judge, who was sitting in this case as a High Court Judge. The discs were actually in Bahasa Indonesia, a language derived from the Malay originally spoken in parts of Indonesia, as in Malaysia.

the Home Ministry was purporting to enforce. Deciding the constitutional questions as well, the High Court held that, as the directive was a nullity, the seizure violated the constitutional guarantee of religious freedom in article 11 and also the guarantee against discrimination on grounds of religion in article 8.[43]

This decision was rendered in March 2021, and the High Court judgment is persuasive. Unfortunately, the events challenged by Jill Ireland took place 13 years earlier, and the proceedings had a *Bleak House* flavor to them. The government took an appeal. In 2023, however, the government decided not to pursue the appeal, and the proceedings finally ended after a decade and a half.

In other respects, however, the decision has nothing Dickensian about it. At the time of decision, the Catholic *Herald* decision was still good law, and so the Court of Appeal had held it was not open to the High Court to adjudicate the legitimacy of the prohibition of the word Allah, but it was open to adjudicate the validity of the directive invoked to justify the seizure and the compliance of the government's action in seizing the CDs with articles governing freedom of religion and freedom from discrimination, which the High Court did. It would seem that the foundations of the Allah restrictions have been rather thoroughly and persuasively undermined by this decision in its latest iterations.

There are other indications of a judicial recognition of constitutional rights even when Syariah statutes are involved.[44] The earlier error of thinking that article 121(1A), depriving lower civil courts of jurisdiction "in respect of any matter within the jurisdiction of the Syariah courts," divested the civil courts of jurisdiction to adjudicate constitutional questions merely because the matter would, without those constitutional questions, fall within Syariah court jurisdiction has been corrected. Some politicians may still think that the provision that "Islam is the religion of the Federation" in article 3(1) creates an Islamic state, but it now seems clear that few Malaysian judges,

[43] Article 8(1) is a clause guaranteeing equal protection of the law. Article 8(2) provides: "Except as expressly authorized by this Constitution, there shall be no discrimination on the ground only of religion, race, descent, place of birth or gender in any law . . . ." The availability of articles 3, 8, and 11 for litigants to challenge Syariah regulations also has implications for discrimination against dissenting sects in Malaysia, such as Shia and Ahmadiyah, which I have not discussed here.

[44] Compare *Muhamad Juzaili b. Mohd. Khamis v. State Government of Negeri Sembilan*, [2015] 3 MLJ 513 (Ct. App.), reversed on other grounds, [2015] 6 AMR 248 (Fed. Ct.), in which the Court of Appeal held a Syariah statute unconstitutional, but the Federal Court reversed on procedural grounds without reaching the constitutional question, with *Kamariah bt. Ali v. Government of the State of Kelantan*, [2002] 3 MLJ 657 (Ct. App.), in which the court had implied that the freedom of religion provisions of the federal constitution were not available to Muslims, a position at odds with a fair reading of the pertinent constitutional clauses. (I am indebted to Andrew Harding for alerting me to the Juzaili case.)

irrespective of ethno-religious identity, agree with that quite unfounded revisionist position.[45]

I have dwelled on these peculiarly Malaysian questions at length in order to demonstrate that well-constructed constitutional guarantees of religious freedom, ethnic and religious equality, and non-discrimination can be made to work, even in a social and political environment of above-average religious and ethnic exclusivism and even in the face of rather tightly guarded state-level (Syariah) power in a devolved regime. What was thought to be immune to constitutional review is no longer.

In the Malaysian case, some perverse paths were taken by the judiciary. That judiciary appears to have recovered its equilibrium and its fidelity to the constitution, after a period in which the impression had been created that matters before the state Syariah courts could proceed untethered to the constitution and that certain constitutional rights might be irremediable because of the religious identity of one or more parties to a controversy. Decisions on religious freedom and on the limited jurisdiction of the Syariah courts will have a strong effect on the ability of Syariah functionaries to restrict minority religions and religious dissenters as well.[46]

There is more work to be done. Portions of the public, Syariah personnel, and many politicians have long been misled about the relations between Syariah and constitutional law and between court systems, and about the secular constitutional system that was set up at independence. The implementation of constitutional principles by recalcitrant bodies, especially the reform-resistant federal Department for Islamic Development (JAKIM) and its state-level counterparts, will undoubtedly be uneven and often non-compliant. Thus far, however, the public and political reception of the latest (and more faithful) constitutional doctrine has been relatively tranquil, but ultimately much will depend on cultivating respect by politicians and even some judges for the utility of law in maintaining constitutional boundaries.[47]

[45] Two of the earlier dissenters, one Muslim, the other not, later became chief justices.

[46] See especially *SIS Forum (Malaysia) v. Kerajaan Negeri Selangor*, BKA-1-01/2021 (Fed. Ct.), in which the Federal Court, by unanimous vote of nine judges, held unconstitutional a state statute that gave a Syariah court jurisdiction to review decisions made by state Islamic religious authorities. The power of judicial review is, the court stated flatly, "reposed solely in the Civil Courts."

[47] An example of the difficulty is provided by *Loh Siew Hong v. Nazirah Nanthakumar bt Abdullah*, [2022] MLJU 391 (High Ct. 2022), in which a Hindu Chinese woman sued to regain custody of her three minor children who had been unlawfully converted to Islam by her husband after the breakup of their marriage and his own conversion. The High Court unequivocally determined that custody must be restored to the mother. After it was, she brought suit to nullify the children's conversion, but the High Court declined, because their unilateral conversion had been valid under state Syariah law and because the children had apparently evinced their determination to continue as Muslims even after their return to the custody of their mother, a determination later denied. See www.malaysiakini.com/news/664741. When she appealed

Indonesia's Judicial Malfunction

If Malaysian courts have reverted to their traditional function, Indonesian courts have not entirely departed from theirs. Unfortunately, however, the Indonesian courts have a much less robust rule-of-law tradition to which they might return. Controlled by the executive in the colonial period and the half-century thereafter, the judiciary did not develop strong norms of independence. Even after the fall of Suharto in 1998, the ordinary courts, including the Supreme Court, were plagued by inefficiency, arbitrariness, and corruption.[48] Reform efforts were rebuffed, and when judges were appointed from among practitioners outside the career judiciary corps, there was friction between them and the career judges.

A new Constitutional Court, established after an essentially new constitution was adopted through a series of amendments between 1999 and 2002 and staffed initially with some distinguished professionals, was at first an outperformer. Its appointment process also allowed the appointment of politicians, and it, too, subsequently produced decisions that seemed rather arbitrary and untethered to constitutional provisions. After some members of the court, including the chief justice, were arrested for corruption in 2013, the appointment process became more careful,[49] and fewer politicians were selected. Yet some of the Constitutional Court's decisions, as we shall see, remain quite problematic. For all of these reasons, the Indonesian courts have not emerged as consistent and diligent protectors of the rights of minorities, particularly religious minorities, in devolved regions.[50]

Early on, the Constitutional Court had decided a number of cases in which constitutional rights were recognized and protected. Some of these decisions proved to be controversial, but the court easily survived controversies arising out of them.[51] But when the matter involved devolution or religion, or the two together, the court stumbled rather seriously.

this manifestly incorrect decision to the Court of Appeal, some Islamist politicians stated publicly that conversions ought never to be undone, and they referred threateningly to an episode of violence related to a case in Singapore in the 1950s. Nevertheless, in 2024, the Court of Appeal quashed the children's conversion certificates and held the unilateral conversion law of the state of Perlis to be unconstitutional. All three sitting judges were Muslims. *Malay Mail*, January 10, 2024.

[48] See Sebastiaan Pompe, *The Indonesian Supreme Court: A Study of Institutional Collapse* (Ithaca: Cornell University Southeast Asia Program, 2005) and the authoritative volume by Simon Butt, *Judicial Dysfunction in Indonesia* (Melbourne: Melbourne University Press, 2024).

[49] For details and proposals for further improvement, see Pan Mohamad Faiz, "A Critical Analysis of Judicial Appointment Process and the Tenure of Constitutional Justices in Indonesia," *Hasanuddin Law Review*, Vol. 2, no. 2 (2016), pp. 152–69.

[50] For a fuller discussion of the rule-of-law deficit in Indonesia, see Horowitz, *Constitutional Change and Democracy in Indonesia*, pp. 233–46.

[51] See Shah, *Constitutions, Religion and Politics in Asia*, p. 190.

We have observed earlier that violence, especially against groups regarded as not indigenous to the devolved district or against groups regarded as antagonists in the struggle to control a new district, was very common in the years following the implementation of the regional autonomy scheme. We have also noted the prodigious proliferation of Indonesian districts over the years. We have seen, too, that with the proliferation of districts came a decline in ethnic violence. The decline appears to have been associated with increasing ethnic homogeneity in the successor districts.[52]

Less violence and greater homogeneity did not necessarily produce less discrimination. Districts that had become relatively homogeneous were not necessarily devoid of minority populations, only of minority populations in proportions that made them capable of defensive or retaliatory violence. As in Northeast India, increasing homogeneity simply made remaining minorities more vulnerable to coercion.[53] At the same time, a supervening religious cleavage began to emerge in regions, provinces, and the whole country.

The Indonesian constitution ties the state to "belief in the One and Only God,"[54] but the drafters, in 1945 and subsequently, consistently rejected any claim that Indonesia be a state affiliated with any one religion, despite repeated demands that it enforce Islamic obligations on members of the Muslim majority. The constitution, as heavily amended between 1999 and 2002, is rich in guarantees of equality and religious freedom. Everyone is to be accorded "equal treatment before the law" and to be "free from discrimination."[55] Religious freedom is protected by a right of a person "to practice one's religion," "to believe in his or her faith," to express "views and thoughts in accordance with his or her conscience," and to "worship, each according to his or her belief."[56] Underpinning these freedoms is a "right to feel secure against and receive protection from the threat of fear to do or not do something that is a human right."[57] The one qualification is that restrictions may be imposed by law to satisfy demands of "morality, religious values,

[52] Samuel Bazzi and Matthew Gugeon, "The Political Boundaries of Ethnic Divisions," *American Economic Journal: Applied Economics*, Vol. 13, no. 1 (2021), pp. 235–66.

[53] A tendency exacerbated by the desire of regional majorities for an indigene of the region to be the elected district head, a recurrent desire that almost always excludes minorities. See Jim Schiller, "Electing District Heads in Indonesia: Democratic Deepening or Elite Entrenchment?" in Erb and Sulistiyanto, eds., *Democratic Deepening in Indonesia?*, pp. 147–73, at p. 157.

[54] 1945 Constitution of Indonesia, as amended, Preamble and art. 29(1).

[55] Ibid., arts. 28D(1) and 28I(2), respectively.

[56] Ibid., arts. 28E(1), (2), and art. 29(2), respectively.

[57] Ibid., art. 28G(1). Law no. 39 of 1999 on Human Rights, art. 1(3) defines discrimination as differential treatment based on religion, ethnicity, or race (among other enumerated affiliations) that could impair someone's human rights or freedoms.

security and public order in a democratic society."[58] In spite of this apparently narrow qualification, it was recognized shortly after regional autonomy was implemented that discrimination against ethnic or religious minorities within districts constituted a challenge to these rights.[59] That challenge came to fruition in a major way.

The Indonesian constitution accords the Supreme Court power to review "ordinances and regulations made pursuant any law" for their conformity to the provisions of that law[60] and the Constitutional Court power to review national laws for their conformity to the constitution.[61] Neither court has performed adequately in these delegated tasks of judicial review.

As we have seen previously, in 2014 the Indonesian legislature made provision for governors and the Home Affairs Ministry to review regional laws and cancel them where they conflict with national law or policy. Undoubtedly, this authority was conferred because of the inability of the Supreme Court to fulfill its constitutionally assigned role of adjudicating the lawfulness of regional regulations. Their sheer volume could scarcely be handled by a court adjudicating one case at a time, even if the Supreme Court were disposed to do so. Often there appears to have been no such inclination. Many cases that were filed were apparently not subsequently decided, and few decisions seem to have been reached in cases of ethnic or religious discrimination. Moreover, in those that were decided, compliance was by no means assured, and violence against religious minorities and churches in certain devolved Islamist areas continued more or less unabated.

Of course, cases brought on behalf of minorities might also have involved reliance on constitutional provisions, and so the Constitutional Court, not the Supreme Court, would have had jurisdiction over those, except that the constitution makes no explicit provision for that court to review regional laws.[62] Alternatively, the 2014 statute ought to have filled the gap, because it conferred on governors and the Home Ministry explicit power to nullify regional laws that did not conform to national law or policy, which would

[58] 1945 Constitution of Indonesia, as amended, art. 28J(2). Because of this subsection, the Constitutional Court has often refused to find unconstitutional statutes that impair religious freedom. See Simon Butt, *The Constitutional Court and Democracy in Indonesia* (Leiden: Brill, 2015). The morality and religious values clause has been construed more broadly than the language might suggest, for example to justify public school instruction with a sectarian bent.

[59] See Gary F. Bell, "Minority Rights and Regionalism in Indonesia: Will Constitutional Recognition Lead to Disintegration and Discrimination?" *Singapore Journal of International and Comparative Law*, Vol. 5, no. 2 (2001), pp. 784–806.

[60] 1945 Constitution of Indonesia, as amended, art. 24A(1).

[61] Ibid., art. 24C.

[62] Needless to say, the Constitutional Court itself might have filled that lacuna, as other constitutional courts, including (as we have seen) the Malaysian Federal Court, have done. And see the broad language of ibid., arts. 24(A)(1) and 24(C)(1).

include the abundant constitutional protections for minority rights.[63] Unfortunately, in two cases decided in 2017, the Constitutional Court decided that the provisions of the Regional Government Law conferring authority on governors and the Home Ministry to nullify regional laws that violated national law or policy were unconstitutional.[64]

The Constitutional Court held that the nullification of regional laws was an ineluctably judicial function confided to the Supreme Court. It noted the possibility that governors or Home Ministry officials might make cancelation decisions in conflict with decisions or doctrines laid down by the Supreme Court—although, of course, any such decision could itself be appealed to the Supreme Court, and the dissent pointed out that the statute in question did not interfere in any way with the power of the Supreme Court.

As we know, however, the Supreme Court had often failed to adjudicate challenges to regional regulations. In at least one notable case, in which a woman had been convicted and sentenced to prison and a fine under a regional law for wearing lipstick, the Supreme Court had decided not to review a challenge, ironically on the ground that the legality of the regional law was for the central government executive and legislature to decide.[65]

The Constitutional Court decisions according exclusive jurisdiction to the Supreme Court were trenchantly criticized by Simon Butt, who enumerated the common abuse of the power to make regional laws by authorities that imposed unlawful taxes and fees and discriminated against women and minorities. At the time of the two decisions, some 25,000 regional laws were awaiting review. The Constitutional Court decisions relegated these to the exclusive jurisdiction of a court that, when it reviewed regional laws at all, considered only one case at a time, whereas the Home Ministry administrative review found to be unlawful had previously dealt with many such laws at a single stroke.[66]

The Constitutional Court effectively left much unlawful regional action unchallengeable.[67] While fewer anti-minority laws were enacted at the

[63] In 2008, the then-newly-sworn-in chief justice of the Constitutional Court had stated (extrajudicially) that regional religious regulations were unlawful because they discriminate against minorities. *Jakarta Post*, August 23, 2008.

[64] Perkara 137/PUU-XIII/2015 (Mahkamah Konstitusi); Perkara 56/PUU-XIV/2016 (Mahkamah Konstitusi).

[65] The case is described by Melissa Crouch, *Law and Religion in Indonesia: Conflict and the Courts in West Java* (New York: Routledge, 2014), p. 58. In other cases, deadly local attacks on members of dissident Islamic sects (Shia and Ahmadi) resulted, at most, in light sentences. See, e.g., Shah, *Constitutions, Religion and Politics in Southeast Asia*, p. 159.

[66] Simon Butt, "The Indonesian Constitutional Court: Reconfiguring Decentralization for Better or Worse?" *Asian Journal of Comparative Law*, Vol. 14, no. 1 (2019), pp. 147–74.

[67] The constitution makes it clear that all regional authority emanates from law made by the central government. See 1945 Constitution of Indonesia, as amended, arts. 1 (unitary state), 18(5) (central government specifies matters delegated to regions), 18(7) (central government regulates regional structures

regional level by the time of these decisions, there was still being practiced in many regions "religious majoritarianism at the local level, at the expense of the rights of religious minorities."[68]

What also made the fate of regional minorities especially precarious was a Constitutional Court decision in 2010 that had upheld the constitutionality of a criminal prohibition on blasphemy. That prohibition had its origin in a Sukarno-era presidential decree of 1965,[69] during a period in which rights recognition had been in abeyance. Blasphemy was defined in the decree as insulting or dishonoring a religion. The prohibition had rarely been enforced under Suharto's New Order regime that followed Sukarno's, but the end of that regime in 1998 and the subsequent Constitutional Court decision gave rise to a new and considerable enthusiasm for prosecutions, which number in the hundreds. The majority of offenses for which convictions have been obtained are the promulgation of "deviant doctrines" within religious communities, mainly Islam. This broad interpretation of the statute makes life perilous for heterodox Muslims as well as for Christians, especially those who have converted from Islam and are then accused of misrepresenting their former faith. Pressure for convictions seems frequently to have intimidated courts trying such cases when they are mobbed by crowds organized by extremist groups outside the courthouse.[70]

The blasphemy decision is very difficult to justify in the light of Indonesia's strong constitutional protections for freedom of religion reviewed earlier. So are a number of the Constitutional Court's decisions on freedom of religion. But, again, there is an irony. At the time of the blasphemy decision, the chief justice of the Constitutional Court gave a press interview in which he claimed that the law "provides the state with the task of preventing the public from taking the law into their own hands when they feel the names of their religions are being tainted." The decision, he said, was intended "to avoid anarchy."[71] What the decision actually did was the opposite. It created incentives for crowds to demand prosecutions and convictions of multiple victims, and it was followed by violence against minorities in certain districts. The idea that rights can be conditioned on the likely violent

and administration), and 18A (central government regulates relations between central government and regional authorities).

[68] Crouch, *Law and Religion in Indonesia*, p. 10.

[69] Putusan 140/PUU-VII/2009 (Mahkamah Konstitusi); Presidential Decree no. 1 of 1965 on Prevention of the Misuse or Insulting of a Religion. The decree had been incorporated into the criminal code in 1969, after Suharto had become president.

[70] See Crouch, *Law and Religion in Indonesia*, p. 172.

[71] Quoted in the *Jakarta Globe*, April 28, 2010.

behavior of those seeking deprivation of those rights reflects a dubious theory of constitutional adjudication. Yet that notion has, in practice, guided decisions.

It might seem that we have strayed somewhat from regional regulations into the realm of national criminalization of expressions of constitutional rights, but the first is almost surely causally related to the second. A great many blasphemy cases have originated in the same districts that had enacted unlawful Syariah requirements and prohibitions at the behest of radical Islamist groups. A great many are directed at Christians, some of them converts from Islam. Had the Home Ministry and the courts been diligent early on about affirming the rights of Christians and Muslim minorities at the regional level, when *ultra vires* regulation of those rights first appeared, it is doubtful that the nationalization of religious conflict that Indonesia subsequently experienced would have occurred. At the time the new (that is, thoroughly amended) constitution was adopted between 1999 and 2002, Islamic parties were well represented in the legislative body sitting as a constituent assembly. Islamist demands for insertion of a constitutional clause obliging Muslims to abide by Islamic law were rejected by all but two parties representing a small fraction of the whole; and there was a strong sense, in that body and outside, that Indonesia was embarking on a new birth of freedom.

The devolution of power in the regional autonomy laws during the same time frame was seen by radical Islamists as an opportunity to accomplish at the district level what could not be accomplished at the national or even at the provincial level. Their impunity, enabled by the early lethargy of national executive and judicial authorities, combined with the Constitutional Court's legitimation of the blasphemy statute a decade later, facilitated the nationalization of minority oppression.

The culmination of these efforts was the sensational blasphemy prosecution of a rising politician of Chinese-Christian background. Basuki Tjahaja Purnama, popularly known as Ahok, had urged Muslim voters not to fear casting ballots for him in the race for governor of Jakarta. He cited a passage of the Qur'an and urged listeners not to misinterpret it for the purpose of inducing people to avoid voting for him. The complaint against Ahok had been filed by a radical, often violent Islamist organization, which had enjoyed a considerable measure of *de facto* impunity,[72] and there is strong evidence that the tape of the speech for which he was tried had been altered. Nonetheless, in 2017, Ahok was convicted and sentenced to two years in prison in a

[72] See Shah, *Constitutions, Religion and Politics in Asia*, pp. 256–57.

trial that may well have been—almost surely was—affected by the presence of crowds outside the court demanding severe punishment, including death, for the accused.[73] The Constitutional Court's original blasphemy decision had, as I suggested, created the street disorder it had sought to avoid, but now that disorder was also directed at the courts themselves, as a form of friendly persuasion.

In 2019, a year after the Supreme Court affirmed Ahok's conviction, Indonesia held a national election in which the presidential race was a rematch of the contenders of five years earlier. This, however, was an election unlike Indonesia's previous presidential contests. The challenge of radical Islam had grown dramatically in the previous five years. A growing demand for state-supported Islamism now confronted the pluralism long espoused by traditionalist Muslims and members of religious minorities. The incumbent president, Joko Widodo, nicknamed Jokowi, began to use authoritarian methods against his Islamist opponents, while he curried favor with pluralist Muslims, whereas his opponent, Prabowo Subianto, was supported by those who wanted a regime much more identified with an intolerant Islamism. The results reflected the acute polarization that had overtaken the country. Jokowi, the winner, increased his support in provinces where traditionalist Islam was dominant or religious minorities were numerous, whereas Prabowo prevailed in those with long histories of more radical Islamist movements.[74]

It would be an exaggeration to claim that the success of Islamist organizations in persuading regional politicians to produce Shariah regulations had, by itself, led directly to the national-level polarization exhibited in the 2019 presidential election. It does, however, seem more than plausible to think that regional government action hostile to minorities and refusal to abide by even those trial court judgments that ordered regional officials to grant permits for churches to function, compounded by the opportunities for organization and public demonstrations opened up by the Constitutional Court's blasphemy decision, and the epiphany provided by the *Ahok* case, all together enhanced the saliency of issues of religious deviancy and the alleged danger of forces outside Islam. This confluence of forces contributed to the strength and the nationwide reach of organizations that had previously been regarded as fringe groups inclined more toward terrorism and local anti-minority

[73] One anti-Ahok rally, before his arrest, was said to have involved 200,000 participants. It turned violent.

[74] For an exposition of these events and their potential implications for democratic development, see Edward Aspinall and Marcus Mietzner, "Nondemocratic Pluralism in Indonesia," *Journal of Democracy*, Vol. 30, no. 4 (2019), pp. 104–18. In 2024, Prabowo, endorsed by Jokowi, won the presidency.

street action and arson. Regional tyranny over encapsulated minorities, left unchecked by a poorly developed judiciary offering only modest and unpredictable constitutional protection,[75] and increasingly afflicted with ethical problems,[76] certainly can have larger consequences and almost surely did in Indonesia.

Kenya: Judicial Reluctance and Inapt Procedures

I noted earlier that Kenya has strong constitutional protections against ethnic discrimination.[77] These protections can be enforced in the courts.[78] The constitution also enjoins the national government to take measures to give full effect to these protections, and it explicitly authorizes affirmative action programs to achieve this purpose[79] and also to assure that "minorities and marginalized groups" are represented in governmental bodies and are afforded "special opportunities" in education, the economy, and employment.[80]

Even before the 2010 constitution was promulgated, a Kenya National Cohesion and Integration Act[81] had established a commission of that name, with a mission to eliminate ethnic and religious discrimination in public resources, employment, and property ownership, among other fields. Although the Commission is authorized to receive complaints of discrimination, to order discriminatory activity to cease, and to refer complaints to the attorney general or the Human Rights Commission, it prioritizes dialogue, consensus building, education, research, negotiation, establishment of principles and frameworks, to mention just a few of the buzzwords it uses. Adjudication seems not to be in its tool kit.

That is by no means to say that it has failed to perform useful work. The Commission has been involved in forging some peace accords in troubled areas, such as Nakuru County in 2012. It is rather to say that enforcing anti-discrimination provisions is not within its remit.

[75] Criticism of the Constitutional Court on matters of religious discrimination is abundant. For trenchant critiques, see Mohammad Ibrahim, "The Judicialisation of Discrimination in the Indonesian Constitutional Court," *International Journal of Discrimination and the Law*, Vol. 22, no. 2 (2022), pp. 125–51; Simon Butt, "Between Control and Appeasement: Religion in Five Constitutional Court Decisions," in Tim Lindsey and Helen Pausacker, eds., *Religion, Law and Intolerance in Indonesia* (London: Routledge, 2016), pp. 42–67, at p. 46.

[76] See Azeem Amedi, "Restoring Public Confidence in the Indonesian Constitutional Court," IACL-AIDC Blog, https://blog-iacl-aidc.org/2023-posts/2023/6/29/gd121xoz08w14apf6v0h8blj9le8he.

[77] 2010 Constitution of Kenya, as amended, art. 27. See also ibid., art. 232(1)(i).

[78] Ibid., arts. 22, 23.

[79] Ibid., art. 27(6).

[80] Ibid., art. 56.

[81] No. 12 of 2008.

For its part, a separate Human Rights Commission makes recommendations in cases where complaints are determined to be valid, and it can publicize violations; it also can conduct research, monitor compliance with the act, and engage in education concerning human rights.[82] It is explicitly authorized to adjudicate complaints, and it may compel the attendance of witnesses,[83] but its decision powers extend only to recommendations.[84] The Commission is expressly forbidden to investigate matters involving "equality and freedom from discrimination."[85] In other words, it, too, is not really charged with enforcement in this field.

In 2012, a County Governments Act[86] was passed. Among other things, the act contains a number of provisions designed to insure that government bodies reflect "the cultural diversity of the county," protect against ethnic discrimination, take affirmative action to insure that "marginalized and minority communities" enjoy equal rights with the rest of the population, and appoint entry-level county employees in such proportions that no more than 30 percent belong to "the dominant ethnic community of the county."[87] The act was amended in 2020 to reaffirm those requirements and to add the need for county governments to collect data on ethnic representation, review practices that impede barriers to county employment for members of minority and marginalized communities, and create plans and policies to record data, implement affirmative action, and report and evaluate measures taken to achieve these ends.[88]

This statute was oriented toward regulatory compliance and preventive work more than enforcement. The emphasis on affirmative action contemplated compliance at the intake end and provided little guidance about the processing of complaints, which, as the constitution envisioned, would be handled by the courts, mainly in litigation brought by individual complainants.

It falls, then, to the judges to perform this function as cases arise. It is fair to say that they have not always had an easy time doing so, partly because of divergent conditions from place to place and case to case, partly because the constitution and statutes impose multiple obligations to be fulfilled in these divergent conditions—non-discrimination, affirmative action, and special

[82] Kenya National Commission on Human Rights Act, no. 14 of 2011, as amended.
[83] Ibid., sec. 26(c).
[84] Ibid., sec. 41.
[85] Ibid., sec. 30(e).
[86] No. 17 of 2012.
[87] Ibid., secs. 7, 34(e), 35(1)(2), 65(1)(e), 97, 116.
[88] Kenya County Governments (Amendment) Act, no. 11 of 2020, sec. 22, adding secs. 68(A)–68(E) to the original act.

opportunities for marginalized and minority groups—and it is not always clear in what context each of these obligations must be met. Yet it also seems clear that many courts have not adapted their procedural tools to the task or given the full measure of their attention and critical faculties to these matters.

Devolution was conceived in Kenya as a method of empowering ethnic groups at the local level that had difficulty exercising power at the national level, as I mentioned previously, and of rectifying interregional inequality. The Kenyan courts have been involved in policing the boundaries between branches of the central government and between the central government and counties,[89] and in doing so have been willing to declare unlawful the president's unilateral attempt to use the constitutional amendment process to enhance presidential powers.[90] Cases concerning ethnic discrimination within counties were slower to emerge,[91] but anti-discrimination cases at the national level were being litigated, with only mixed results.

The courts quickly realized that claims of discrimination or failures of affirmative action based on the absence of members of a particular ethnic group on a national commission with a limited number of members, usually no more than 9, would not be sufficient to prove a claim in a country with, officially, more than 40 ethnic groups.[92] On the other hand, when 56.8 percent of the 1,406 revenue assistants of the Kenya Revenue Authority were recruited from only 2 ethnic groups, the High Court found a clear constitutional violation.[93] This seemed an obvious case of unlawful ethnic preference.

The Supreme Court was also reluctant to find discrimination when minority complainants were asking for religious exemption from uniform rules.[94]

[89] See Peter Wanyande, "Devolution, Politics, and the Judiciary in Kenya," in Conrad M. Bosire and Wanjiru Gikonyo, eds., *Animating Devolution in Kenya: The Role of the Judiciary* (Rome: International Development Law Organization, 2015), pp. 58–83; Mugambi Laibuta, "Judicial Adjudication of Intergovernmental Disputes in Kenya: Defining Judicial Boundaries and Appropriate Remedies," in ibid., pp. 145–65; Conrad M. Bosire, "The Courts and Devolution: The Kenyan Experience," in Fessha and Kössler, eds., *Federalism and the Courts in Africa*, pp. 124–44, at pp. 133–41.

[90] *Attorney General & Ors v. David Ndii & Ors*, Pet. no. 12 of 2021, [2022] KESC 8 (KLR) (Sup. Ct. 2022), holding that the president has no power to initiate constitutional amendments.

[91] Jill Cottrell Ghai, "The Bill of Rights and County Governments: Emerging Jurisprudence from the Courts," in Bosire and Gikonyo, *Animating Devolution in Kenya*, pp. 166–90.

[92] *John Waweru Wanjohi & Ors v. Attorney General & Ors*, Const. Pets. nos. 373 and 426 of 2012, [2012] eKLR (High Ct. Nairobi); *Consortium for the Empowerment & Development of Marginalized Communities and Ors v. Chairman and Ors of Selection Panel*, Pet. No. 385 of 2012, [2013] eKLR (High Ct. Nairobi). The court in *Wanjohi* pointed out that, under article 250(4), the ethnic composition of national-level commissions was to be considered "taken as a whole," and so an ethnic shortfall in the composition of a single commission cannot prove a violation.

[93] *Orogo v. Chairman, Board of Directors*, [2024] KEHC 1968 (KLR) (High Ct. Busia).

[94] In one case involving a hijab and slacks for female Muslim students, rather than a prescribed school uniform. *Methodist Church v. Mohamed Fugicha*, Pet. No. 16 of 2016, [2019] eKLR (Sup. Ct.), rehearing denied, [2020] eKLR. And in another, a request by Muslim students for exemption from attending mass at a Catholic public high school. *ABH v. Board of Management*, Pet. no. 14 of 2015, [2016] eKLR (High

Despite these rules of restraint, in cases in which counties are not involved, some courts have been resourceful in policing discrimination. In a case involving discriminatory termination of a lease, the High Court scrutinized the documents and testimony introduced at trial with great care and found a violation;[95] and in another the Environment and Land Court found in favor of a claim to ancestral land rights by a minority group that it held was entitled to affirmative action. In the latter case, the court ordered the central government, which had been allocating the group's land to others, to revoke those titles and give the petitioners priority in land allocation.[96]

Experience of adjudication in cases arising at the county level has been rather different. Most cases alleging discrimination against minorities at the county level have been resolved by avoiding the underlying question. It is worth reviewing some to get a sense of the difficulties.

In Migori County, the governor had created a committee on urban development as part of a World Bank project focused on a single region. Plaintiffs from the Kuria community alleged that they were omitted from consideration for committee membership on ethnic grounds. The three towns covered by the project were all mainly Luo areas, and two that were omitted were Kuria areas. Since the project was based on an international grant, which specified the covered areas and selection procedures, the High Court held it had no jurisdiction to adjudicate discrimination claims.[97] As far as the record discloses, the court took no testimony about who had actually proposed that certain areas be included in the project and others be left out. It seems quite possible that county officials had been involved in those decisions.

Other cases have been dismissed on procedural grounds, in spite of what might have been meritorious claims had they been heard.[98] In still other cases, decided on pleadings and affidavits, failures of proof have been easy for courts to find. The result has been to exempt county officials from potential liability for discrimination.

In one such case, the High Court held that a claim that applicants who were shortlisted for government positions had lesser qualifications than those of the claimants' group who were not shortlisted was dismissed, even though all

Ct. Mombasa). Compare the Nigerian hijab decision in *Lagos State Government v. Asiyat Abdul Kareem* in Chapter 6.

[95] *Al Yusra Restaurant v. Kenya Conference of Catholic Bishops*, Pet. no. 317 of 2014, [2017] eKLR (High Ct. Nairobi).

[96] *Joseph Letuya & Ors v. Attorney General & Ors*, ELC Suit no. 821 of 2012 (Environ. & Land Ct. Nairobi), [2014] eKLR.

[97] *Samson Getobai Maroa & Ors v. County Government of Migori*, Const. Pet. no. 4 of 2018, [2019] eKLR (High Ct. Migori).

[98] See, e.g., *Mathew Lempurkel v. Joshua Wakahora Irungu & Ors*, Const. Pet. no. 279 of 2013, [2013] eKLR (High Ct. Nairobi).

of the positions had been filled exclusively by members of two large groups in the county and none was filled by any applicant from the several smaller groups.[99] The grounds for dismissal were the failure of petitioners to demonstrate that minority applications were actually received and, even if they had been, that those applicants were, in fact, better qualified than those who were shortlisted and appointed. Although it was most unlikely that this evidence was in the possession of the petitioners, the matter was decided on the pleadings and affidavits, apparently without any testimony or documentary evidence that might have elicited relevant evidence from the respondents on receipt of applications or qualifications of applicants. We shall see that quite a number of cases follow such a trajectory.

The same result was reached by the Court of Appeal in a case in which there had been no showing that any of the claimants was actually qualified for the positions in county government, even though positions had been awarded to other applicants who had not been through an interview process. The High Court had held that selection of applicants who had not been interviewed was unlawful and that the plaintiffs belonged to a marginalized group entitled to affirmative action, as defined by article 260 of the constitution. When the Court of Appeal reversed, it seized on statements in a Supreme Court advisory opinion that affirmative action must be "a gradual process,"[100] and it went so far as to say, without explanation, that the courts are ill equipped to determine whether an ethnic group is a "marginalized" or "minority" group entitled to "special opportunities" under the constitution.[101] Absent an authoritative list of such groups, this declaration would foreclose a role for the courts in a significant number of discrimination cases, despite constitutional provisions pertaining to them.

The failure of plaintiffs to prove their cases adequately through the use of affidavits that they themselves provide has allowed courts to find for the defendants without in-person evidence or documentary evidence elicited from respondents and without articulation of appropriate standards for such cases. Consider a decision from Trans-Nzoia, a multiethnic county in which it was alleged that the governor had placed five members of his own Butusu subgroup of the Luhya in positions on the nine-member county executive committee, together with three from the Kalenjin group, and just one from

[99] *Benson Okera Magana & Ors v. County Public Service of Migori County*, Const. Pet. no. 9 of 2017, [2017] eKLR (High Ct. Homa Bay).

[100] Supreme Court of Kenya Advisory Opinion no. 2 of 2012.

[101] *Governor of Bungoma County v. John Mining Temoi*, Civ. Appeal no. 12 of 2015, [2019] eKLR (Ct. App. Kisumu), reversing a carefully considered judgment in *John Mining Temoi v. Governor of Bungoma County*, Const. Pet. nos. 2 & 2A of 2014, [2014] eKLR (High Ct. Bungoma). For the "special opportunities" clauses, see 2010 Constitution of Kenya, as amended, arts. 27(6), 56, 232(1)(i).

another group.[102] Likewise, the Public Service Board was composed of seven members, of whom five were Butusu Luhya and two were Kalenjin. The county secretary was also a Butusu Luhya. These exclusionary appointment patterns might suggest that such rough proportions for membership had been agreed by some group leaders in advance. The petitioner, a member of the Kisii minority who, it seems, had earlier run unsuccessfully for the county governorship, challenged these appointments on grounds of ethnic discrimination. Among other defenses, the respondents contended that Kisii are not indigenous to the county, a fact that would not be constitutionally relevant.

The court held that the petitioner's proof was inadequate, because he failed to show in his affidavits that he had applied for any of the appointments, and he had alleged but not proved the ethnic identities of the actual appointees. To be sure, it may well be that only disappointed applicants have standing to challenge appointments, although this is most doubtful in Kenya,[103] and that might be sufficient ground for dismissal. Be that as it may, the court went further into the merit of the challenge, and it found none. It did not occur to the court that if the plaintiff's allegations were true, this was a quintessential case of ethnic nepotism and blatant discrimination requiring a trial to test the allegations.

The underlying basis of the decision may have been revealed in a concluding remark in the judgment, in which the court rejected the idea that the Kisii might be regarded as a minority in the county: "… no evidence was provided to fit the Kisii community into the aforementioned definitions of a minority group. *Such a status … cannot simply be acquired by mere settling of a group of people of one ethnic group in an area other than their established ancestral home e.g. members of the Kisii or any other ethnic group who have settled and 'adopted' the county of Trans-Nzoia as their home*."[104] Indigenousness—and a judicial bias favoring it—would seem to have reared its head, and in a way rather clearly not contemplated by the County Governments Act or by the constitution, which, unlike Nigeria's, contains absolutely no such preferences for groups deemed to be indigenous to a county.

Other cases have also been decided on the basis of inadequate pleadings, and some of these cases might also have been decided on similarly doubtful foundations.[105] Several of the cases already discussed might well have involved ethnic discrimination that could not be proved because the courts

[102] *Joel Onsare v. Governor of Nzoia & Ors*, Const. Pet. no. 4 of 2014, [2015] eKLR (High Ct. Kitale).

[103] See Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules, 2013, Rule 4(2), on standing to institute proceedings.

[104] Ibid., para. 50 (emphasis supplied).

[105] See, e.g., *Jonathan Cheprot Takur v. County of Bungoma*, Const. Pet. no. 15 of 2018, [2021] eKLR (High Ct. Bungoma).

dismissed the petitions without affording any opportunity to secure pertinent documents or hear the testimony of relevant witnesses. There has been a real reluctance to find discriminatory behavior even in some instances of what appear to be unequal treatment of ethnically differentiated complainants.[106]

As we have just seen, there is a hint or more than a hint of local bias in some of these cases. Suggestively, a study of Kenya's High Court criminal appeals finds that ingroup favoritism does reveal itself from time to time, in outcomes and in language used in written judgments.[107] High courts, after all, sit locally, in county seats, and they may also think about ethnicity in local terms that may not accord with constitutional prescriptions. More importantly, the frequent propensity to decide cases without trial, merely on the basis of pleadings and affidavits, precludes a searching evaluation of live testimony and documentary evidence that might reveal the existence or absence of discriminatory behavior and thereby leaves wide open the possibility of error. This procedural practice may occasionally be connected with bias, but it appears independently to be quite common and is likely to be the stronger element.

Dismissal based on absence of evidence to prove an alleged violation in advance of any trial is common in other legal systems, but only if there is no dispute about any fact that is material to the determination and, therefore, no need for a trial. In the United States, for example, such a practice is called summary judgment, but it is generally based on an extensive (sometimes too extensive) pre-trial discovery process, including reciprocal production of documentary evidence exchanged between the parties and often deposition of witnesses by the adverse parties under oath. This pre-trial practice allows each side to learn facts relevant to its case and so to enhance the accuracy of the factual record on which summary judgment or, on the other hand, a decision to conduct a trial can be made.

The practice in England and Wales, from which Kenyan practice was originally derived, is very different. There is no provision for pre-trial depositions, but interrogatories are allowed, by which parties can learn significant elements of their opponents' cases, and rather full witness statements before trial are common. These statements set out in advance the content of a witness' testimony at trial and might be very informative for Kenyan parties and judges alike in evaluating the evidence that might be produced if a trial were

[106] In addition to cases previously cited, see, e.g., *Samuel Njuguna Magu & Ors v. Makueni County Government & Ors*, Const. Pet. no. 14 of 2016, [2017] eKLR (High Ct. Machakos).

[107] Donghyun Danny Choi, J. Andrew Harris, and Fiona Shen-Bayh, "Ethnic Bias in Judicial Decision Making: Evidence from Criminal Appeals in Kenya," *American Political Science Review*, Vol. 116, no. 3 (2022), pp. 1067–80. The incidence of ethnic favoritism was in the 3–5 percent range and was associated with judges of only a single group.

to be held. The English practice is favorably inclined to decisions made only after a trial.

As I have said, the Kenyan cases are notable, because generally no trial was conducted, and there had been no real attempt, through any pre-trial process, to learn the accuracy of the facts alleged by the petitioner and denied by the respondent. The petitioner was usually unable to prove allegations on the basis of affidavits alone in circumstances in which the petitioners' affiants are unlikely to be knowledgeable about the respondents' decision processes that might actually constitute the violation that formed the basis of the claim. For that matter, petitioners are unlikely to be knowledgeable about the content of relevant documents in the possession of the respondents that could prove or disprove the validity of the allegations.

Of course, there are rare Kenyan cases in which discrimination has been found and remedies ordered,[108] and sometimes courts, again very rarely, have been able to award relief to the complainants while still avoiding a determination of the unlawful discrimination that had been alleged.[109] In short, cases brought against counties, in which ethnic discrimination has been found, are likely to be far less numerous than are repeated reports of discrimination and, indeed, than the reported facts in some of the cases themselves might suggest.

The result is that, after more than a decade of devolution, the Kenyan courts had not developed a serious jurisprudence of anti-discrimination law. In the judgments, no consensus is evident on how to identify county minorities or marginalized groups, both of which are considered to be constitutionally protected classes, or when affirmative action is to be provided, or what inferences can be drawn from lopsided statistics on ethnic representation that seem to favor ruling cliques in the county.[110] A number of cases that appeared to have some merit were dismissed on procedural grounds, and relatively few county governments had been forced to defend what might well have been meritorious challenges to practices, especially employment practices, that seemed to smack of ethnic discrimination. The claims were frequently dismissed on the inadequacy of claimants' pleadings and affidavits, without the respondents' having to produce an affirmative defense.

[108] I have found only one such case of a discrimination judgment against a county that was not reversed on appeal. See *Republic of Kenya v. Tana River County Assembly*, Jud. Rev. Misc. Civ. Applic. no. 10 of 2013, [2014] eKLR (High Ct. Malindi). Cf. *Jane Achieng & Anor v. University of Nairobi*, Cause no. 2144 of 2012, [2015] eKLR (Employment & Labour Ct. Nairobi) (not a county case).

[109] See *John Githui Gatua v. County Govt. of Turkana*, Land Case no. 89 of 2012, [2017] eKLR (Environment & Land Ct. Kitale).

[110] For example, whether the burden of going forward and producing evidence of ethnically neutral decision making might shift to respondents once a gross disproportion in ethnic representation during a selection process had been shown.

It is difficult to say what lay behind the alacrity with which courts have been able to dismiss complaints on procedural grounds without full evidentiary records. The Civil Procedure Act clearly contemplates a pre-trial discovery process with respect to documents, interrogatories, and testimony, and it also contemplates judgment only "after the case has been heard."[111] The Civil Procedure Rules certainly appear to assume that trials are the normal way to determine outcomes,[112] and one of the rules states that affidavits may be superseded by live testimony whenever a party requests it.[113]

There is, however, another set of rules specifically applicable to proceedings to enforce provisions of the Bill of Rights, namely the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.[114] These rules say nothing about pre-trial discovery and may, by their silence, preempt the possibility of securing interrogatories or depositions. They specify that the hearing of petitions is to be based on affidavits, written submissions, or oral evidence, unless the court directs otherwise.[115] The rules go on to say that "[the] court may upon application or on its own motion direct that the petition or part thereof be heard by oral evidence."[116] So the underlying assumption seems to be that live testimony might be exceptional, rather than routine, and ordered only if the judge so decides, just as it was in the practice before the adoption of the 2010 constitution.[117]

In case of conflict between the Civil Rules and the Constitutional Rules, the latter would prevail over the former, but in constitutional cases the court may utilize the Civil Rules if there is no conflict.[118] The absence of discovery in the Constitutional Rules is a serious omission. Counsel may apply to the court for access to documents in the respondents' possession, but an easier way to procure such documents is through a freedom of information request pursuant

[111] Kenya Civil Procedure Act, cap. 21, Act no. 12 of 2012, secs. 22, 25.

[112] Kenya Civil Procedure Rules, 2010, Order 3, Rule 2(b), for example, refers to "a list of witnesses to be called at the trial, written statements signed by witnesses, and documents to be relied on at the trial."

[113] Ibid., Order 19, Rule 1. This order and Order 3 in the note immediately above were not among those amended by the Civil Procedure (Amendment) Rules, 2020.

[114] Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, promulgated by the Chief Justice, pursuant to 2010 Constitution of Kenya, as amended, art. 22(3).

[115] Ibid., rule 20(1). Note the disjunctive "or."

[116] Ibid., rule 20(3).

[117] For the court's apparent discretion to rely on affidavits, rather than oral evidence, see *Daniel Kibet Mutai & Ors v. Attorney General*, Civ. App. No. 95 of 2016, [2019] eKLR, para. 38 (Ct. App. Eldoret). On the court's duty to resolve conflicts in affidavits by hearing oral evidence, rather than dismissing the case, compare the Nigerian judgment in *Anzaku v. Governor of Nasarawa State*, [2005] 5 NWLR 448, 502 (Ct. App. per Nzeako, J.C.A.), appeal dismissed sub nom. *Lafia Local Govt. v. Governor of Nasarawa State*, [2012] 17 NWLR 94 (Sup. Ct.).

[118] For exceptionally helpful email exchanges about the procedural rules and their application, as well as the Access to Information Act (see below), I am indebted to Emmah Senge Wabuke. The interpretation and conclusions, for which she bears no responsibility, are entirely my own.

to the Access to Information Act, 2016, which requires production within 21 days, on pain of judicial sanctions for public officials who do not comply.[119] That act furnishes an effective way for petitioners challenging government selection and other procedures to do their own extrajudicial discovery and then introduce documentation that may help to prove a discrimination case.

I have, however, found no reported case in which documents located through this method—or, for that matter, any other method, including leave of court—have been obtained from respondents and utilized as evidence in a discrimination case against a county government or its officials.[120] The failure to locate and obtain documentary evidence relevant to the discrimination claim suggests missed opportunities on the part of counsel, who may also have failed to plead with sufficient specificity even to allege a violation and so avoid dismissal at the threshold.[121]

The current Constitutional Rules state clearly that they are to be interpreted in accordance with the constitutional provision stating that "justice is to be administered without undue regard to procedural technicalities" and with regard to promoting the objectives of the constitution's Bill of Rights.[122] As far as one can tell from the reported cases alleging ethnic discrimination, applications for hearings to include oral evidence are either very rare or nonexistent, and judges themselves seem generally disinclined to order such hearings on their own motion. Ironically, this procedural constriction is contained in rules made pursuant to constitutional provisions broadening standing to allow anyone acting in the public interest to bring a claim and greatly broadening the relief available under the previous constitution.[123] Opportunities to prove—and even to hear—a case are not fully exploited.

Some part of the tendency to limit oral evidence may be the consequence of an urge to avoid wasteful trials whenever possible, in order to clear crowded dockets. This was one of the explanations I received when I put the question (with the help of a Kenyan expert) to two experienced trial lawyers and a law lecturer in the relevant field. In different ways, they put the reliance on

[119] Kenya Access to Information Act, no. 31 of 2016. See sec. 4 on the obligation to provide information; sec. 5(1)(iii) on the specific obligation to provide information on procedures for decisions taken; sec. 9(1) on the 21-day limit; and secs. 17–19 on judicial sanctions.

[120] Compare *Al Yusra Restaurant v. Kenya Conference of Catholic Bishops*, a non-county case discussed above.

[121] I say this because in some of the cases reviewed here the allegations were so general and so unsupported by facts that the complainant's pleading could only be judged defective, even under procedural rules that require courts to avoid "procedural technicalities." See the immediately following paragraph in the text.

[122] 2010 Constitution of Kenya, as amended, art. 259(2).

[123] Ibid., arts. 22(2), 23(3), respectively.

determinations without live evidence down to Kenya's general litigation culture, involving a preference of both lawyers and judges to work from a less time-consuming paper record.

Of course, such a record may be adequate in certain classes of cases, especially in contract disputes, where both sides possess the document and where the meaning of a clause is at issue—although even there the meaning of specialized terminology may require testimony—but it is certainly not adequate in many cases in which ethnic discrimination is alleged. In several cases involving applicants for positions, the court dismissed the petition on the ground that the petitioner did not show that any member of the victimized ethnic group with appropriate qualifications had applied for a position.[124] But, of course, applications for positions were entirely in the possession of the respondents, who might have been called upon to produce them. If there is to be a rethinking of methods of anti-discrimination enforcement in Kenya, it will need to include ways to enhance the motivation and ability of the complaining parties to have access to facts relevant to the claimed discrimination. It will also be necessary to augment the expertise of judges to work in a still relatively new field of litigation.

Beyond this, it seems possible that a judiciary trained to be cautious in confronting power, as Kenya's has sometimes been,[125] might be chary of bold interventions in local decision processes. As I have intimated, it appears that some local judges exhibited a preference for "indigenous" groups over minorities who may have been less established or less powerful in the county, precisely what the constitution aims to prevent.[126] Any rethinking of procedures might also consider ways of reducing any hint or possibility of local bias or, worse, the possibility that local oligarchies and machines built on exclusive ethnic foundations have formed in some counties, potentially a very serious problem.[127]

Whatever the precise causes, Kenya, which admittedly has been focused on prevention of conflict more than redress, has been slow to develop an

[124] But see *John Kipng'eno Koech v. Nakuru County Assembly*, Pets. Nos. 23 & 25 of 2013, [2013] eKLR (High Ct. Nakuru), holding that failure *of the respondents* to show that they had based their personnel decisions on the criteria laid out in the relevant statute was sufficient to prove a violation.

[125] See Migai Akech, "Judicial Review in Kenya: The Ambivalent Legacy of English Law," in Swati Jhaveri and Michael Ramsden, eds., *Judicial Review of Administrative Action across the Common Law World* (Cambridge: Cambridge University Press, 2021), pp. 191–212. Akech points hopefully to the liberalized pleading practice under the constitutional petition procedure as a potential gateway to more flexible adjudication. Ibid., pp. 203–09. Most of the cases reviewed here were brought under the constitutional petition procedure, with, however, the results described above.

[126] 2010 Constitution of Kenya, as amended, art. 27(4)–27(8).

[127] See, again, Behrend and Whitehead, "The Struggle for Subnational Democracy."

effective anti-discrimination regime.[128] There are multiple opportunities for discriminatory behavior to escape judicial notice or capacity for redress and yet have profound consequences for the welfare of ethnic groups and individuals. The most extreme examples are mass evictions from land during periods of ethnic violence, the scope of which may lend itself more to political intervention and conciliation than to judicial redress. Although one can imagine a significant role for adjudication even after serious violence, many legal systems are not currently geared for such an enterprise. But cases of more limited scope that do make their way to adjudication should have a more rigorous judicial screening than the current adjudicatory regime seems to provide.

It is impossible to say that any or all of the cases in which methods of uncovering evidence are vulnerable to criticism would have resulted in proven violations of constitutional guarantees if specified procedures had been different. But procedural rules are intended to elicit accurate factual determinations, and the Kenyan rules do not seem uniformly conducive to that end. With modest reforms or even changes in customary practices, the judiciary itself ought to be able to help ameliorate these problems.[129]

At the conclusion of the previous chapter, I observed that constitutions can speak in forked tongues in multiple ways to provide guarantees of equality and then withdraw them from certain categories of citizen. The same can be true when constitutions do not contain the ambiguities possessed by the constitutions of Ethiopia, India, and Nigeria. In Malaysia, a constitutional misinterpretation that had created a lacuna in protection of rights of religious minorities at the state level has been corrected, at least for the time being. Indonesia's several judicial malfunctions have created serious lacunae of such protection. And Kenya's bar and bench have, by dint of customary judicial practice (and the occasional judge who failed to perceive that "indigenes" do not enjoy a legally favored position in Kenya's counties), provided inadequate enforcement of the constitution's clear prohibition of ethnic discrimination. These are three idiosyncratic sets of errors that impaired the robust protection of minorities encapsulated in devolved units. They make clear that there is no substitute for effective courts that provide redress for constitutional violations and for prophylaxis against violators. In Kenya, there should be very few obstacles to making such a change.

[128] Cf. Mohamud Adan and Ruto Pklaya, *Conflict Management in Kenya: Towards Policy and Strategy Formulation* (Nairobi: Practical Action, 2006), pp. 32–33.

[129] For a good example of judicial rectification of problems in the procedures of a county legislature, see *County Assembly of Bungoma v. Stephen Nendela*, Civ. App. no. 336 of 2014, [2017] eKLR (Ct. App. Eldoret).

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8

Toward Remediation?

Devolved units create bounded environments in which unchecked dysfunctional behavior, including ethnic discrimination, can flourish, especially, but not only, in units conceived by central decision-makers as ethnic homelands. Strong ideas of indigenousness and belonging can appear and can have exclusionary effects even in settings that were not so designated. Or straightforward ethnic rivalry, antipathy, or simply the desire to control a devolved unit or avoid feared control by others may motivate discriminatory behavior.

It would be too much to claim that all the intra-unit pathologies we have identified can be reduced to severe ethnic divisions within those units. Nevertheless, most have connections to ethnic conflict. The proliferation of units is often sought by ethnic groups in a unit precisely in order to create greater ethnic homogeneity or freedom from domination by others. *Ultra vires* laws and regulations issued by devolved units are often rooted in a desire to penalize ethnic or ethno-religious opponents or to achieve conformity with the norms of local majorities. Between 2009 and 2016, 421 such regulations adopted in Indonesia targeted women or minorities. Recentralization is often fostered in order to control certain disfavored ethnic groups within units. Ethnic conflict may not be the only phenomenon at work in producing these pathologies—certainly, greed and rent seeking are present—but ethnic conflict is a major causal element in the six cases we have investigated most closely and the behavior most in need of remediation.

Persistent ethnic or ethno-religious discrimination within devolved units might seem to be a fairly homogeneous category of pathology, but its precise origins are obviously very different from one country to another. In the six cases on which we have lavished greatest attention in the previous two chapters, most exclusionary behavior has eluded redress, but—strikingly—for different reasons in each. If redress is to be achieved, the method of redress must take account of the specific, country-specific origins of the shortfalls in design or enforcement. What follows are speculations about the course that might be taken in each of the six countries to rectify shortfalls in rights to equal treatment. In some cases, visibility about the conditions in which rectification might occur is difficult to attain. In all six, of course, precise steps

for remediation cannot be specified from outside. All we can do is describe what a promising course might consist of, when the occasion is ripe.

Ethiopia's Homeland Stalemate

Ethiopia's problems are multiple. The constitution guarantees every "Nation, Nationality and People" a right to govern itself in ethnic homelands and to establish its governmental institutions in its home territory.[1] The federal design is based on notions of homelands knitted together in a single country,[2] but the established homelands are too few by far to take account of the multiple groups in the country, in which settlement patterns do not match geographic boundaries.

The largest groups have a strong stake in preserving their capacious homelands. Members of various groups, large as well as small, are to be found in multiple federal units but without equal rights and privileges in spite of constitutional declarations,[3] which are lacking in reliable enforcement bodies, because those do not operate consistently or at all. Dissatisfied groups demand their own states or a transfer of their areas to different states, but these requests are rarely granted, and so state-level minorities chafe under the domination of the titular majorities of the states in which they are located. And in one case, Harari state, larger groups are subordinated to the homeland status of the smaller titular group[4]—a pattern of majority subordination that we have seen in parts of Northeast India, in Gagauzia in Moldova, in the southern Philippines, and elsewhere.

The Nigerian pattern of dividing up large groups into multiple states appeals to some advocates of reform, but the largest Ethiopian groups, Oromo and Amhara, and Somali as well, would not countenance a division of their territory. Reform-minded Ethiopians tend to favor rethinking of the homeland design altogether, but Ethiopian politics is tied closely to conceptions of "nationalities" that occupy their own territory. Fundamental constitutional change has been mooted in Ethiopia,[5] but it may be thwarted by civil disorder, or warfare, or an effective veto by some of the largest groups.

[1] 1995 Constitution of Ethiopia, as amended, art. 39(3).

[2] With, at least in theory, a right to secede. Ibid., art. 39(1). For the "prison house of nationalities" theory underlying this right, see Berhun Adugna Gebeye, "Why Ethiopia Needs a New Constitutional Settlement," www.iconnectblog.com/2021/11/why-ethiopias-crisis-needs-a-new-constitutional-settlement.

[3] 1995 Constitution of Ethiopia, as amended, art. 25.

[4] Fessha, "The Original Sin of Ethiopian Federalism," p. 233.

[5] See, e.g., Abadir Ibrahim and Kokebe Wolde, eds., *In Between Failure and Redemption: The Future of the Ethiopian Social Contract* (Evanston: Roberta Buffett Institute for Global Affairs, 2022).

We saw earlier that Nigeria's ability to reconfigure its federal system radically to distribute the three largest groups in multiple states and to free smaller groups from domination by larger ones was made possible by the idiosyncratic exigencies of cultivating the support of essential groups in the Biafran civil war. Any such conditions have little likelihood of replicability in Ethiopia. Settlement patterns in Ethiopia have created heterogeneous states and heterogeneous cities that would be served best by a radical turn toward a serious emphasis on ethnic equality and a doctrinal rejection of homeland theories that confer superior privileges on designated groups endowed with homeland status. These changes might be accomplished whether or not there are changes in state boundaries, but a serious question is the identity of the body that could initiate them with the acquiescence of state governments.

In May 2022, a petition was filed with the Council of Constitutional Inquiry, the advisory body for the Ethiopian House of the Federation,[6] challenging the constitutionality of clauses in state constitutions that define the constituent communities in exclusive ways and contending that they discriminate on ethnic grounds.[7] It is surprising that this case, with its explosive potential, was accepted by the Council, and it would be even more surprising if the Council were to recommend a resolution or if the House would decide it if the Council were to send up its recommendation. Instead, the government dissolved the organization that had brought the claim.

It seems impossible that incremental action by an adjudicatory body could accomplish so ambitious a task. The main significance of the challenge is to underscore how fragile the constitutional arrangements are.[8] As of now, Ethiopia's constitutional design cannot guarantee the freedoms promised by the document, and it seems unlikely, too, that the main beneficiaries of the homeland system could be persuaded to accede to a fundamental reorientation of that system—and perhaps even more so after the Tigrayan warfare and its aftermath in Amhara that has had such devastating effects. The need is

[6] 1995 Constitution of Ethiopia, as amended, arts. 82–84.

[7] Request submitted for the repeal of constitutional clauses from the constitutions of the states, www.ethiopianreporter.com/78384. I am indebted to Yonatan Fessha for calling my attention to this case and providing a translation. Articles in the constitutions of eight states are alleged to "violate the rights of minority ethnic groups living in various regions and contradict the federal constitution." The petition refers to clauses that accord ownership of states to "named nationalities" and exclude others living in those states. The petition also asked for the creation of an expert committee to examine the constitutionality of other laws, policies, and practices in the states and present the results to the Federation Council. For Ethiopian state constitutions and their ethnic exclusions, see Fessha, "Ethiopia: Constitutional Déjà Vu," in Patricia Popelier, Giacomo Delledonne, and Nicholas Aroney, eds., *Routledge Handbook of Subnational Constitutions and Constitutionalism* (Oxford: Routledge, 2022), pp. 129–44.

[8] In 2023, the Ethiopian government took small steps toward convening a body that might revise the constitution, but this was happening as conflicts over territory were heating up, not long after a ceasefire had been agreed between Ethiopian armed forces and those of Tigray, and armed Oromo forces had also mobilized.

great, but the time is out of joint, unless major actors realize they have something to gain from a fairer and more stable system than the one put in place in 1995.

In the end, Ethiopia's prospects for renovation may be connected to its prospects for democratization, which might open new opportunities to modify the homeland assumptions of its constitution and might also put in place more effective mechanisms for enforcing guarantees against discrimination. The considerable instability of Ethiopia's constitutional politics could eventually lead in those directions, but they might just as well lead in other, far more disintegrative directions.

India's Constitutional Contradictions

The source of officially sanctioned discrimination in India's Northeast lies in constitutional protection of the interests of Scheduled Tribes, which produces territorial dispensations conferring special privileges enforced against other groups with which those tribes are intermingled. Those Scheduled Tribes are then able to control multiple opportunities and resources, to the disadvantage of others. Undoubtedly, it would be impossible to alter the Sixth Schedule of the constitution in major ways without creating a serious wave of tribal discontent. Furthermore, Indian politicians at the central and state level benefit from their power to confer autonomous councils or even new states to be governed by Scheduled Tribes. These decisions create political loyalty from tribes on which autonomy has been conferred. This reciprocal relationship constitutes another inhibition on constitutional change. Because many groups in the Northeast are not unconditionally attached to the Indian state, which some had fought for years in armed secessionist movements, abrupt withdrawal of privileges through constitutional amendments or sweeping judicial decisions would meet with great resistance.

Nevertheless, in contrast to Ethiopia, intervention by an independent judiciary is not foreclosed. The particular configurations—and especially the extensive Scheduled Tribe privileges authorized for newly devolved regional councils and newly created states—are not completely fixed by the Sixth Schedule but usually adopted by decisions of politicians at the federal or state level. Extreme disproportions in reserved seats and extensive exclusion of other tribes and non-tribal Indians from economic and political opportunities in Scheduled Tribe-governed states and autonomous councils stamp them as second-class citizens and limit the contributions they could make to the general welfare. It does not seem impossible to fashion individually

granted Sixth Schedule reservations to conform in various ways to constitutional guarantees in the same way as reservations for Scheduled Castes, Other Backward Classes (OBCs), and domiciliaries of states do elsewhere in India.

The number of district and regional council seats reserved for a titular Scheduled Tribe group is, as we have seen, frequently very high, sometimes absurdly so, close to 100 percent. The Sixth Schedule enables Scheduled Tribe interests to prevail over others by their overwhelmingly reserved council majorities and the powers accorded to councils they govern. Indeed, the average council's more limited geography and the explicit tribal identity of the councils and their populations frequently make it unnecessary to propitiate the interests of multiple tribes in a single council area. Narrow exclusivism can thrive in such an environment.[9]

Exclusive access to government employment, land, and licenses to exploit resources, and the rents that come with them, have wreaked hardship on non-scheduled groups, tribal and non-tribal, those originating in the state and those from outside it. The ability of some states to prevent in-migration from other states stifles competition as it limits the rights of Indian citizens to reside wherever they choose in the Union. The extent of the privileges conferred on Scheduled Tribes in the Northeast makes violence to secure those privileges more attractive, and the deals reached by leaders of armed groups with state and federal politicians have often been extravagantly generous to the preferred groups and ungenerous to others who reside in their midst. Generosity is a matter of degree, and excessive generosity might be amenable to judicially enforced rules of moderation, even if the population of a council area has a majority from a single tribe, as most do.

The Sixth Schedule contains some regulatory rules concerning these matters, and it does not, by itself, endorse all the practices that have developed. It authorizes the governor to make rules regarding "the composition of district and regional councils and the allocation of seats therein."[10] While it does acknowledge the existence of reserved seats, with a few specified exceptions, it lays down nothing about the extent of those reservations. Likewise, it confers on councils the power to make laws relating to land, but only with

[9] For similar findings with respect to Scheduled Tribe reserved seats in state legislatures, where, despite common-roll electorates, Scheduled Tribe concentration typically creates Scheduled Tribe majorities averaging about 63 percent of the constituency, creating "incentives to cater to ST [Scheduled Tribe] interests," see Francesca R. Jensenius, *Social Justice through Inclusion: The Consequences of Electoral Quotas in India* (Oxford: Oxford University Press, 2017), p. 181. There are no such incentives for caste favoritism among Scheduled Caste representatives, whose constituencies are far more heterogeneous. Ibid., p. 3.

[10] 1949 Constitution of India, as amended, Sixth Schedule, sec. 2(6)(a).

regard to land use, including "agricultural, grazing, residential or other non-agricultural purposes likely to promote the interests of the inhabitants of any village or town."[11] That last phrase suggests that non-tribals are not excluded, and the power to collect land revenue and taxes says nothing about differential rates of taxation favoring Scheduled Tribes over outsiders.[12] The issuance of licenses or leases for mineral prospecting or extraction is not limited by the Sixth Schedule to Scheduled Tribes.[13] Councils have, however, enacted their own restrictions in these areas.

Two powers that are spelled out in the Sixth Schedule are the power to restrict money lending to tribals and the power to prohibit anyone who is not a Scheduled Tribe member from carrying out "wholesale or retail business in any commodity without a license."[14] The latter restriction, which applies only to a limited type of business, may only be imposed by a vote of three quarters of the council members, and a proviso allows anyone who has been in these businesses before the restriction is enacted may continue to operate. So even express restrictions are quite specific and circumscribed.

Taken as a whole, and with the exception of the last-named restrictions, the authority granted to local or regional councils by the Sixth Schedule does not seem to contemplate monopolies or near-monopolies accorded to members of Scheduled Tribes. To be sure, the schedule envisions that Scheduled Tribes will be located in specific areas where they are important components of the population, hence influential in political decision making, and benefiting from (some) reserved seats, but discrimination with the wide scope that prevails in the Northeast is difficult to square with what was probably contemplated in the Schedule.[15]

It is true that the Sixth Schedule confers power to legislate on the various subject areas connected to the councils' business,[16] and some councils enjoy long lists of permitted subjects on which to legislate, but there is no mention of any ethnic restrictions that may be entailed. Yet the Sixth Schedule, as sometimes conceived in Indian constitutional theory and sometimes construed in case law, is a barrier to reasonable accommodation of the interests of Scheduled Tribes with those of others residing in the same states or council areas. Perhaps the Schedule need not be such a barrier.

[11] Ibid., sec. 3(1)(a).
[12] Ibid., sec. 8.
[13] Ibid., sec. 9.
[14] Ibid., sec. 10(1), 10(2)(d).
[15] Although so many different views were expressed in the three days of debate on the Bardoloi Report in the Constituent Assembly that it is difficult to discern specific intentions on many points underlying the Sixth Schedule. See Stuligross, "Autonomous Councils in Northeast India," pp. 502–06.
[16] 1949 Constitution of India, as amended, Sixth Schedule, sec. 2(7)(b).

What stands in the way are some admonitions about judicial reluctance to interfere with the constitutional scheme, and the case law that has developed around the Sixth Schedule and those provisions. The admonitions are, of course, wise.[17] The case law, however, is in a somewhat unsettled state.

In a review of the cases, Louise Tillin has discerned "a degree of legal ambiguity around the extent to which the Sixth Schedule supersedes basic provisions of the Constitution."[18] As she documents, some Supreme Court decisions state that the "tribal areas of Assam are not governed by the relevant provisions of the Constitution that apply to other constituent States of the Union of India but by the provisions contained in the Sixth Schedule." These provisions "purport to provide a self-contained code of governance of the tribal areas forming part of Assam and they deal with all the relevant topics in that behalf."[19] Other benches of the Supreme Court have taken a contrary position—that the Sixth Schedule "is not a constitution within a constitution."[20]

It is not possible to maintain that India has more than one constitution. These figures of speech merely convey notions of how far provisions based on the Sixth Schedule might be permitted to depart from otherwise applicable constitutional guarantees. Such general notions do not necessarily determine the outcomes of cases.

The constitution itself provides for certain exceptions to some fundamental rights guarantees in Sixth Schedule cases, as I mentioned in Chapter 6. Although article 14 states flatly, and without exception, that "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India," article 15, in a more circumscribed formulation, forbids discrimination "on grounds only of religion, race, caste, sex, place of birth or any of them." That article also contains a clause stating that "Nothing in this article or in [article 19(1)(g) concerning the 'practice of any profession or trade'] shall prevent the State from making any special provision for the advancement of … the Scheduled Tribes."[21] Article 16, forbidding discrimination in public employment, contains, in clauses 4 and 4A,

[17] See *Kuldip Nayar v. Union of India*, AIR 2006 SC 3217 (Sup. Ct. 2006).

[18] Louise Tillin, "Asymmetric Federalism," in Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta, eds., *The Oxford Handbook of the Indian Constitution* (Oxford: Oxford University Press, 2016), pp. 540–59, at p. 553.

[19] Ibid., quoting *Ewanlangki E-Rymbai v. Jaintia Hills District Council*, (2006) 4 SCC 748[5] (Sup. Ct. 2006).

[20] Tillin, "Asymmetric Federalism," p. 552, quoting Pu Myllai Hlychho v. State of Mizoram, (2005) 2 SCC 92 (Sup. Ct. 2005).

[21] For the sake of brevity, I omit mention of other classes of beneficiaries, such as Scheduled Castes, in the provisions cited here.

similar exceptions for reservations in posts or promotions in favor of Scheduled Tribes that are not adequately represented in state offices or in specific grades. In addition, article 46 enjoins the state to "promote with special care" the "educational and economic interests" of Scheduled Tribes.

The constitution also contains a series of articles denominated "Special Provisions Relating to Certain Classes," including Scheduled Tribes. These concern reservations of seats in federal and state legislative bodies, as well as reservations of government positions.[22] Large portions of these were added by constitutional amendments. Several further sections concern extensive "special provisions," often quite favorable to Scheduled Tribes, for a number of tribal-homeland states in the Northeast.[23] These, too, were added by amendments. Members of the Constituent Assembly (CA) may have thought the Sixth Schedule arrangements were not to be permanent—and there were statements in the CA to this effect—but the provisions have actually been augmented.

The problem that courts have had is to reconcile these provisions and those laid down by state governments for autonomous district and regional councils with both the specific rights clauses and the basic design of the Indian constitution. Judicial review of legislation and executive action is well established in India. Since the *Kesavananda* decision of 1973, even amendments to the constitution have also been subject to judicial scrutiny for their conformity to the basic structure of the constitution.[24] Basic structural features that are protected from abrogation by amendment include, among others, democracy and the republican form of government, the secular character of the state, free and fair elections, and the equality of citizens. A number of these features are implicated in litigation under the Sixth Schedule and articles related to specific states.

There is no need to rehearse all the case law here. It is, however, instructive to see how the Supreme Court has grappled with the lawfulness of Scheduled Tribe privileges that might appear to contravene constitutional guarantees.

On several occasions, the court has imposed a limiting construction on the authority of a council. A limiting construction involves interpreting the words of a statute narrowly, sometimes even more narrowly than a legislature may have intended, to avoid a result that would impinge unduly or unfairly on the rights or interests of some party or parties—and usually to avoid having to decide a constitutional question, the decision of which might do more

[22] 1949 Constitution of India, as amended, arts. 330, 332, 335.
[23] Ibid., arts. 371A, 371B, 371C, 371F, 371G, 371H.
[24] *Kesavananda Bharati v. State of Kerala*, AIR 18975, 1973 SC 146 (Sup. Ct.). This is a landmark decision, endorsed by a nine-judge majority.

damage. A district council created for Scheduled Tribes that had the power to make law regarding "allotment, occupation or use, or the setting apart of land" had tried to prohibit the sale or other forms of transfer of land in the council territory to non-tribals. The High Court had held this restriction to contravene the constitutional guarantee of equality. Avoiding the constitutional question, the Supreme Court decided instead that the authorization of allotment and the other specific powers over land allowed only authority to regulate the occupation or use of land, not the transfer of land.[25] Other cases, referred to in footnote 25, have used the same technique. That is, without reaching the constitutional question, the courts deny authorization in the law for the challenged practice.

It is, however, not always possible to avoid confronting a clash between actions taken under the Sixth Schedule and the basic principles of the constitution. In *Ewanlangki E-Rymbai v. Jaintia Hills District Council*,[26] a Christian had been denied eligibility to stand for election to become chief. The relevant statute had prescribed that chiefs and headmen were to conform to existing customs of the tribal group concerned. The secretary of the autonomous district council (ADC) had excluded Christian clans of the tribe from providing candidates on the ground that the chief of the tribal group in this case must perform both administrative and traditional indigenous-religious functions, which Christians could not do. The Indian constitution is thoroughly secular, but, as we have just noted, article 15(1) prohibits discrimination "on grounds only of religion." The evidence showed that previous chiefs had always performed both secular and religious functions, and on these grounds the Supreme Court held that the exclusion from eligibility to stand for election was not *only* on grounds of religion but on the inability to perform all the functions of the office.[27]

Religion, but not only religion, had been implicated in an earlier Sixth Schedule case in which constitutional questions could not be avoided.[28]

[25] *District Council of United Khasi and Jaintia Hills v. Sitimon Sawian*, 1972 AIR 787 SCR (1) 398. For a similar treatment, see *District Council of Jowai Autonomous District v. Dwet Singh Rymbai*, 1986 AIR 1930, 1986 SCR (3) 569 (Sup. Ct.). In *Pu Myllai Hlychho v. State of Mizoram*, (2005) SCC 92, the Supreme Court dealt with a claim that the action of the governor of a state need not conform to a standard requirement of the constitution, as the Sixth Schedule is "a constitution within the constitution." Rejecting this claim, the court held that the governor actually had complied with the constitutional requirement, thereby obviating the conflict.

[26] 4 SCC 748[5] (Sup. Ct. 2006).

[27] The court also cited constitutional provisions for the protection of tribal interests. 1949 Constitution of India, arts. 26(b), 29(1). Neither section, however, relates to public office or governmental functions. If the performance of religious functions were so crucial to the chief's position, one might wonder why the matter could not be left to the voters to decide, rather than ruling a candidate ineligible to stand.

[28] *R.C. Poudyal v. Union of India*, 1993 AIR 1804, 1993 SCR (1) 891 (Sup. Ct.).

Sikkim had joined the Indian Union in 1975. Its founding electoral arrangements had two problematic features. Of the 32 seats in the state legislature, 1 seat was reserved for a member of the Buddhist Sangha or priesthood. The Sangha would comprise its exclusive electorate as well. Twelve more seats were reserved for members of the two ethnic groups, the Bhutia[29] and Lepcha, that had supported the Chogyal, the former autocratic ruler. Those two groups comprised between 20 and 25 percent of the population but were allocated 40 percent of the seats, more if the Sangha seat were included, close to a 100 percent overrepresentation. Two seats were also reserved for Scheduled Castes. Nepalese citizens of Sikkim, a majority of the state's population, most of them Hindu, were left with the opportunity to compete for the remaining open seats, a majority but short of a proportionate share, even if Nepalese were able to win them all.

Article 371F(b) of the constitution, pertaining specifically to Sikkim, seems to have given its blessing to these arrangements, which had been reached under the influence of the previous ruler before the state's accession to India. On the other hand, article 332(3) of the constitution requires that reserved seats for Scheduled Tribes "shall bear, as nearly as may be, the same proportion to the total number of seats" in the state assembly as the Scheduled Tribe population bears to the total population of the state. By this standard, the reserved seat arrangements were egregiously unlawful. So the question was whether these arrangements and article 371F(b) were in accordance with the basic structure of the constitution, with its strong protections for the secular character of the state, free and fair elections, and equality.

A five-member bench of the Supreme Court wrestled with these matters in *Poudyal v. Union of India*.[30] The majority decided that the seat reserved for the Buddhist Sangha did not constitute discrimination "on grounds only of religion," because the Sangha was not merely a religious body but also a "political and social institution" in Sikkim. As the dissent pointed out, this was an argument that could very easily support multiple establishments of religion in a secular India for Hinduism, Islam, Sikhism, and Christianity, since all of these are also political and social institutions.[31]

The three-member majority also justified the disproportionate representation of the Bhutia-Lepcha on the ground that the departure from proportionality need only be non-arbitrary and bear a rational relation to the object of

[29] The Bhutia are a composite group of eight subgroups.

[30] (1994) Supp. (1) SCC 324 [5] (Sup. Ct.).

[31] India has gone out of its way to avoid associating states with religious establishments, most notably in Punjab, where it repeatedly refused to create a Sikh state until 1966, when Punjab was divided, ostensibly on grounds of language rather than religion.

the statute prescribing the disproportion. This rational relation the majority found in the political evolution to full democracy as Sikkim emerged from autocratic rule and entered the Indian Union with a reduced fraction of reserved seats from its pre-accession fraction, albeit still not a proportional one. Rather than deciding whether article 371(F) was consistent with article 332(3),[32] which, as noted, requires proportionality in the allocation of Scheduled Tribe reserved seats, the majority pointed out that 371(F) was clearly intended to depart from 332; and it took comfort in the fact that Nepalese could, in spite of the disproportionate Scheduled Tribe reservation, still win a majority of seats. Article 371(F) was therefore held not to violate the basic principles of democracy in the Indian constitution.

A concurring opinion noted that the Bhutia-Lepcha had held 50 percent of the seats in Sikkim under the autocratic regime, and the 12 reserved seats were a compromise between their former share and their proportionate share, and this allocation of reserved seats therefore met the "as nearly as may be" proportional standard of section 332(3). This is an exceptionally doubtful interpretation of the meaning of those quoted words, since it would be a simple matter to make the number of seats much closer to the proportional standard.

The chief justice filed a lengthy dissent. Especially in view of India's long history of religious strife, he found the reservation for the Sangha to violate the religious discrimination clause of article 15 and also, because the electorate for that seat was to consist only of members of Buddhist monasteries, to violate article 325, which prohibits separate electorates, even for reserved seats. The chief justice found the justification for the Sangha seat resting on the social and political functions performed by the Sangha to be plainly inadequate, since all religions perform such functions from time to time, as I mentioned above.

In reviewing the history of article 371F, the chief justice discerned an intention that Sikkim join India on par with other states and consistently with provisions applicable to them. The grant of a disproportionate share of reserved seats he held to be a violation of the democratic requirement of equal suffrage in article 326. If article 371(F) of the constitution were found to have authorized disproportionate Bhutiya and Lepcha seat reservations, he would find that article in violation of the basic principles of the constitution.

The chief justice was unpersuaded by the argument that the history of reservations before Sikkim joined India justified a more modest but still-disproportionate regime of reservations for the Bhutia and Lepcha. That

[32] 1949 Constitution of India, as amended, art. 332(3).

history involved the Chogyal's attempt to shore up his position when Sikkim was still an independent state by reserving fully half the legislative seats for the Bhutia and Lepcha, plus the seat reserved for the Sangha. In the dissent's view, the authoritarian history of these reservations could not serve as a justification for a lesser "compromise," but still disproportionate, share of reserved seats in India's democratic setting.

The dissenting judgment in *Poudyal* seems much more persuasive than either of the judgments upholding the two provisions challenged in the Sikkim case. The "as nearly as may be" modifier of the proportionality clause of article 332(3) would seem to indicate that deviations from proportionality must be tightly confined to those arising from practical limitations in carrying out the proportionality mandate for Scheduled Tribe reservations. If I am right about this, then other justifications, such as those advanced for Sikkim, might be precluded.

The extent of the deference accorded to the constitutional amendment at issue in *Poudyal* is considerable. The majority judgment crossed three bright lines in India's democratic dispensation: those in favor of secularism, those mandating electoral proportionality (one person, one vote), and those prohibiting separate electorates or what in India and in British colonial practice were called "communal electoral rolls." Despite their differences about the outcome, the justices unanimously made it quite clear that controversies about tribal representation matters are fully justiciable.[33]

These cases, in which the Supreme Court has been very cautious about finding unconstitutional provisions in cases involving special arrangements for Scheduled Tribes, nevertheless show that challenges to provisions privileging Scheduled Tribes may be entertained and scrutinized carefully. The Indian constitution contains clauses casting doubt on according excessive privileges to Scheduled Tribes, even as it exhibits solicitude for what are considered the limitations of tribal development. In analogous matters, namely provisions to aid Scheduled Castes and OBCs, the courts have developed methods of precluding the growth of excessive privileges for beneficiary classes. In *Indra Sawhney v. Union of India*,[34] the Supreme Court held that reservations for OBCs were permissible in government employment but must not exceed 50 percent in the states and 27 percent in the central government. The court also decided that the "creamy layer"—that is, the most economically advanced members of the backward classes[35]—should

[33] Among the rejected arguments for the defense was a contention that Sikkim's arrangements raised only political questions beyond the jurisdiction of the courts.

[34] AIR 1993 SC477, 1992 Supp. 2 SCR 454 (Sup. Ct.).

[35] The reference is to the cream that rises to the top in unhomogenized milk.

be excluded from these preferential benefits, an exclusion that has proven difficult to enforce.

Similarly, we have seen in earlier chapters the aversion of the Indian courts to son-of-the-soil preferences and even to preferences in state government employment for applicants from underrepresented districts within the state. We have also noted the judicial limitation of preferences for in-state residents for admission to educational institutions for professional training. In all of these ways, the Indian Supreme Court has shown that rules of reasonableness must be applied to laws privileging one section of the population over another, even while respecting the need for preferential treatment for disadvantaged categories of citizens. The court has a deserved reputation for boldness in doctrinal innovation, having, for example, applied certain rights provisions against non-state parties,[36] and it is capable of mitigating hardships arising under Sixth Schedule devolution arrangements.

Special territorial arrangements for Scheduled Tribes, whether in tribal states or district councils or regional councils, are a form of devolution to tribal homelands embodying arrangements analogous to son-of-the-soil preferences that are, for other states, frowned on by the courts. As Baruah has observed, they tend to enrich tribal elites—the equivalent of the "creamy layer" of OBCs that courts have tried to exclude from privileges. There are tools that might help to bring a better sense of proportion to the privileges that are conferred.

By tools, I mean doctrinal resources or techniques by which courts can accommodate competing objectives in the law. The first of these for the problem at hand in India is the constitutional principle of proportionality. What justification could there be for Scheduled Tribes, 86 percent of the population of Meghalaya and of Nagaland, to have more than 98 percent of the state legislative seats reserved, leaving only one open seat? Or, in Arunachal, with a tribal population of 69 percent, for an Scheduled Tribe seat reservation of, again, more than 98 percent? The origin of these reservations is found in article 332(3A)(a), of the constitution, which provides that if all the seats in these states had been held by Scheduled Tribes in 1987, then all seats but one should be reserved until the reapportionment to take place after the first census after 2026. (In any state in which all seats were not held by Scheduled Tribes in 1987, Scheduled Tribes are to have—and do have—a proportionate reserved share of legislative seats.[37])

[36] *Kaushal Kishor v. State of Uttar Pradesh*, (2023) 4 SCC 1 (Sup. Ct.).
[37] 1949 Constitution of India, as amended, art. 332(3A)(b).

That census, it appears, will take place in 2034.[38] So this particular anomaly should eventually disappear, but it is difficult to believe that Scheduled Tribes who have been disproportionately advantaged in seat allocation for nearly half a century will, when the time comes, readily acquiesce in a reduction of their advantage. Neither BJP nor Congress politicians who have assiduously cultivated tribal support are likely to make the difficult decision to reduce these obvious advantages in favor of minorities in the relevant states. And, in the meantime, disproportionate seat reservations work injustice, as does the reservation of a majority of legislative seats in general by rendering them inaccessible to candidates of other groups.[39]

Section 332(3A) is an exception to section 332(3), which requires proportionality of seats to population. The exception was inserted in the constitution to pacify tribal sentiments at a time when new states in the Northeast were being created. In spite of its odd result, the *Poudyal* majority did hold that arrangements of this kind must conform to the basic features of the constitution. The *Poudyal* majority sanctioned what it saw as a justifiable disproportion in seat allocation because of special conditions it perceived in the accession of Sikkim to the Indian Union. It seems problematic that very long-term disproportions that reserve "all seats but one" could survive a challenge founded on the general preference for proportional allocations in article 332(3), but *Poudyal* suggests they just might survive. Yet we need to bear in mind that the Sikkim provisions were embodied in an amendment to the Indian constitution, and it may be that the legislative approval of that amendment in New Delhi entitles its provisions to a certain respect not necessarily applicable to provisions less ceremoniously agreed.

A different result might, for example, emerge in cases challenging disproportions in seats allocated to Scheduled Tribes that are granted autonomous districts or regions. They are granted under general provisions authorizing governors to create those authorities, without the benefit of specific constitutional authorization for disproportionate seat reservations. In principle, the same allowance of discretion in provisions for the benefit of Scheduled Tribes applies to state-generated authorizations as applies to those created by constitutional amendments applicable to entire states. Both must not contravene the basic structure of the constitutional scheme, but in practice reservations and powers granted by a constitutional amendment could receive more judicial deference than might an ad hoc determination by a state government

[38] Because of Covid-19, the 2021 decennial census was twice postponed to 2024. That means the next census after 2026 will take place in 2034.

[39] And probably also by exacerbating intra-tribal and inter-tribal conflicts in the competition for election to these reserved seats.

creating arrangements for autonomous district or regional councils. Indeed, the *Ewanlangki E-Rymbai* decision and other cases cited above that apply a limiting construction to find certain exercises of council powers unauthorized illustrate the stricter scrutiny that seems applicable to council (as opposed to state) powers.

There are good reasons why such a distinction might be made. Constitutional amendments are likely to have received more deliberation[40] and to have resulted from a process of balancing considerations of interstate consistency against conditions specific to particular states. On the other hand, delegations of authority from state governments to district or regional councils are, as we have seen, more likely to emerge from a deal between state-level politicians and local ethnic leaders that may accord them and their followers privileges, in order to avert or terminate insurgent violence or to insure their loyalty to the ruling party in the state. For these reasons, state-created arrangements for district or regional councils might be—and probably should be—subject to much stricter levels of scrutiny when challenged for lack of proportionality or lack of conformity to general guarantees of equality and non-discrimination.

Even so, exceptional powers accorded to certain tribal states by constitutional amendment might also be vulnerable to challenge. Consider some examples of powers conferred by constitutional amendments, especially those that were passed in order to create new states. The Nagaland legislative assembly may, by mere passage of a statute, make inapplicable in the state any act of the Indian parliament.[41] With respect to Mizoram, the Indian parliament may not alter any Mizo religious or social practice, or customary civil or criminal law, or any law relating to the "ownership and transfer of land," apparently meaning any land, without the permission of the state's legislative assembly.[42] We have seen the reluctance of courts to validate tribal limitations on land ownership that are based on broad authorizing language. Non-tribals in a tribal state may be restricted in their land rights. They might occupy and work land, but their inability to own it puts them at a grave disadvantage in dealing with tribals who are in a position to authorize their working it. Rent-seeking behavior is inevitable in such a relationship. Inasmuch as this relationship is founded on inequality based on tribal status, it might be seen as a violation of article 14 on equal protection of the laws. As I have noted, article 14, unlike some other rights guarantees, contains no clause allowing exceptions for special provisions for the advancement of Scheduled

[40] For the amendment process, see 1949 Constitution of India, as amended, art. 368.
[41] 1949 Constitution of India, as amended, art. 371A.
[42] Ibid., art. 371G(a).

Tribes. Yet, because of historical instances of land loss by unsophisticated tribals, the power to restrict land ownership could be immune to constitutional challenge. Such restrictions, however, might not be–and probably should not be–immune to a limiting construction, unless, of course, they were explicitly authorized.

The powers accorded to autonomous district councils are well established by the Sixth Schedule. They extend to collecting taxes and fees on a range of activities, including the entry of goods into the council area, the establishment of schools, the regulation of public health, the licensure of businesses, the management of forests, irrigation schemes, and some forms of agriculture, among other fields of activity. Because these powers are clearly stated, they appear to be secure from direct challenge. Recall, for example, the central government's ability, specified in article 15(4), to make "special provision for the advancement of … Scheduled Tribes."

Nevertheless, as we have witnessed, these powers open up many possibilities for discriminatory *application*. It may be possible for groups victimized by discrimination to invoke the equality and non-discrimination provisions of the constitution in cases in which these powers have been utilized to disadvantage members of non-Scheduled Tribes or members of other groups residing lawfully in the council territory. Non-Scheduled Tribe groups experience discrimination when authorities shift the burden of taxes onto them or exclude them from certain spheres of activity, including government employment, or require exorbitant fees to engage in particular businesses, or deliberately locate public facilities exclusively in areas inhabited by particular groups.

On matters of this kind, there are constitutional guideposts and analogies to well-established law, reviewed earlier, that disfavor restrictions on access to opportunities in one state to that state's residents,[43] or that counsel limitations on the proportions of positions to be filled by OBCs. These are rules of reasonableness that might be seen to be relevant and applicable in Sixth Schedule cases where restrictions are severe.[44]

What would the drafting history of the Sixth Schedule suggest about drawing what is allowed under that schedule into closer proximity to what is

[43] Such as *Dr. Pradeep Jain v. Union of India*, 1984 AIR 1420, 1984 SCR (3) 942 (Sup. Ct.). In that case, some Supreme Court judges produced a ringing declaration of how India was one country, in which any citizen could live anywhere, and other judges rested heavily on doctrines of reasonable limits on restrictions based on state residence.

[44] For an important case that allows states to divide entitlements for Scheduled Castes among particular castes and subcastes, depending on their degree of backwardness and their need for special allowances of the quotas for education or employment available to Scheduled Castes as a whole, see *State of Punjab v. Davinder Singh*, 2024 INSC 562 (Sup. Ct. 2024). The case is evidence of growing flexibility in the administration of such constitutionally prescribed benefits.

allowed in the generally applicable provisions of the constitution?[45] The Sixth Schedule was drafted by a committee of the CA that sat to frame the Indian constitution between 1946 and 1949. In the aftermath of World War II, it was thought that tribal loyalties to India were in a delicate state and that tribals could easily become alienated from the new country. The aim was to "see that the aspirations of the people of the area are met on the one hand and on the other, these areas are assimilated with the main stream of the country."[46] If, declared G. P. Bordoloi, who chaired the Committee reporting to the assembly, tribals were to be pressured to integrate into the country at a time when they wanted separation, that would require military force and would make them "hate India" and make the country's frontier areas less secure.[47] A temporary period of autonomy was required for the adaptations of tribal people to be made. That temporary period has been extended multiple times.

Reviewing the report, the chair of the CA, B. R. Ambedkar, believed that autonomous councils could serve to provide a form of tribal self-government.[48] In the debates that took place between September 5 and 7, 1948, a member who feared the emergence of cultural separatism in tribal areas ("some difference may be created between them and us") believed that outsiders should not be allowed to buy tribal land,[49] but others objected to powers to be confided to ADCs to regulate business conducted by non-Scheduled Tribes.[50] Two non-tribal members of the assembly from Assam, the state in which the councils would initially be lodged, thought, on the other hand, that excessive autonomy would create "tribalstan," an obvious, pejorative reference to newly independent Pakistan; and there was also fear that tribal-dominated district or regional councils might pass laws "which may go against the interests of the State or [of] non-tribals."[51]

These objections were overcome by assurances that the powers of ADCs were to be approved by the governor of the state and, in any case, that those powers could be altered later. "[T]he system of autonomous districts should be kept there for future modifications when the proper time comes for the same …. It is not for [a] permanent period. All constitutions are changeable,

[45] The drafting summary that follows is drawn from "Framing the Sixth Schedule," khadc.nic.in/acts_rules_regulations_bills/misc/FramingoftheSixthSchedule.pdf, a publication that can be found on the Khasi Hills Autonomous District Council website and from "Constituent Assembly Debate Relating to 6th Schedule (excerpts)." For the latter, I am indebted to Rohit De.

[46] "Framing the Sixth Schedule," p. 1.

[47] Ibid., p. 3. For the Bordoloi Report, see "Report of the Sub-Committee on the North-East Frontier (Assam) Tribal and Excluded Areas," in B. L. Hansaria, *Sixth Schedule to the Constitution of India: A Study* (Gauhati: Ashok Publishing, 1983), pp. A183–229.

[48] Oddly, he analogized the councils to institutions serving the "Red Indians" of the United States. Ibid.

[49] "Constituent Assembly Debate," p. 2.

[50] Ibid., p. 17.

[51] "Framing the Sixth Schedule," p. 6.

all laws are changeable, and we can change the law, change the constitution, when you think the time is ripe for it."[52] Three quarters of a century on, most tribal groups have become content to remain in India. In that time, however, the powers of Scheduled Tribes have been extended and augmented by a variety of constitutional amendments and deals between state governments and tribal leaders, as I have already pointed out.

The drafting history does not support the view that autonomy was meant to produce a complete and permanent regime apart from the overall constitutional regime. The Sixth Schedule was a product of the apprehensions of the time and the sense that there was no practical choice but to endorse a form of limited self-government in tribal areas of the Northeast. The flavor of the deliberations was that the schedule was a mechanism to ease the transition of those tribal areas into the Indian Union. Concern for the interests of non-tribals in those areas, although evident, was, however, secondary, and there appears to have been little or no sense that the interests of various tribal groups among themselves could prove to be highly conflictual, as they frequently have. The question of discrimination, although raised, was not broached with any seriousness, and it is doubtful that all its later manifestations would have been countenanced by those who were active in framing the Sixth Schedule.

Of course, interests have grown up around the autonomy regime of the Sixth Schedule. Yet, what we have reviewed suggests that there might be opportunities to reduce the distance between what is allowed under the Sixth Schedule and constitutional powers governing specific states in the Northeast, on the one hand, and generally applicable constitutional provisions, on the other. Article 16, on equality of opportunity in public employment, suggests a helpful illustration. Section 16(4) of the constitution allows a state to reserve places for OBCs, if, in its opinion, they are not "adequately represented" in the government service. As we have seen, the judiciary has imposed limits on such compensatory reservations for OBCs. Section 16(4A) provides similar latitude for employing underrepresented Scheduled Tribes.

The Sixth Schedule says almost nothing about public employment in district and regional councils.[53] If a tribal state or council were to implement discriminatory policies against non-Scheduled Tribes, so as to significantly overrepresent Scheduled Tribes and exclude most or all non-Scheduled Tribe candidates from government employment, would not article 16(4A) be a useful guidepost to accommodate Sixth Schedule preferences with constitutional

[52] "Constituent Assembly Debate," p. 5.

[53] See 1949 Constitution of India, as amended, Sixth Schedule, art. 2(6)(h), on the governor's powers to make rules for the employment of council staff.

requirements that Scheduled Tribes be found to be inadequately represented in order to justify preferences? It is, after all, one thing to confer powers on Scheduled Tribes in general terms and quite another to construe those powers as authorizing extensive official ethnic discrimination, in some cases amounting to complete exclusion, even in jurisdictions established for their benefit.

The notwithstanding clauses of articles 15(4) and 16(4A) state that "Nothing in this article [or in article 19(1)(g)] shall prevent the State from making any provision" or "any special provision," respectively, for the benefit of Scheduled Tribes. The word "any," although it sounds limitless, surely refers to the type of provision and cannot mean a provision fundamentally at odds with the essential principles of the constitution. If it meant "without limit," there would have been no need for the lengthy consideration received by the Sikkim provision in *Poudyal*. There are good reasons for not construing "any" to authorize *carte blanche*.

If the courts were to find particular grants or exercises of certain autonomous council powers to exceed constitutional limits, that might, in addition to redressing discrimination, have two major benefits. Such judgments might well reduce the incentives for violence perpetrated to convince state governments to create those councils, with their windfall benefits, in the first instance. (This would not obviate the need for the central government to take stronger action to avert this kind of violence and punish it, rather than allowing states to reward it.) At the same time, by limiting the differences between special provisions and generally applicable constitutional provisions, those judgments might also make it less plausible to claim that the Sixth Schedule is a separate constitution applicable to certain states.

The legal resources for dealing with these problems exist. There are ways to accommodate Sixth Schedule tribal powers and reservations with the generally applicable provisions of the constitution. *Poudyal*, as we noted, makes clear that discrimination in tribal states and councils raises justiciable issues. *Poudyal*, however, exhibits special caution in declaring constitutional amendments to be inconsistent with the general constitutional scheme. Moreover, *Poudyal* concerned reserved seats in states pursuant to a constitutional amendment enacted upon the state's accession to the Indian Union, a particularly delicate transition involving negotiation between a sovereign entity in the course of negotiating a surrender of its independence, on one side, and the government of India, on the other. Actions taken to conform to a constitutional amendment that has received careful executive and legislative consideration would undoubtedly receive the highest degree of legislative deference, as I have suggested, and more so if the amendment contains

explicit terms for accession to India. But *Poudyal* does not deal with the actions of tribal states after accession, actions not legitimated by constitutional amendments. It certainly does not deal with state-level delegations of authority to district or regional councils; and the rationale of *Poudyal* has even less bearing on discriminatory actions by those states or the councils themselves.

Unless there is an applicable constitutional amendment authorizing deviations from generally applicable constitutional provisions, there is reason to think that the very high degree of deference visible in *Poudyal* will be absent. The question is how those delegations and exercises of power will be decided when specific instances of discrimination are challenged. In any hierarchy of judicial scrutiny, specific authorization of discriminatory provisions by states to autonomous district or regional councils might, as I have said, receive less judicial deference than authorizations to states that are contained in constitutional amendments. Similarly, discriminatory action by such councils or even by states, taken pursuant to merely general delegations of power, but without specific authorization of the action taken, might very well receive—and certainly deserve—the most careful scrutiny by the courts.

Perhaps what I have said can be expressed more concisely: Depending on how egregious the authorized discrimination is—and in *Poudyal* it was quite egregious—a very cautious court might defer to the considered judgment of parliament, sitting as a constitutional amending body, but might abandon that deference when the discrimination is embodied in a deal between a state government and what is essentially a tribal movement acting as a regional council or in a law promulgated by a state or regional government constituted to represent a segment of a population and so considering itself permitted to neglect the interests of other segments.

To summarize: For some cases, constitutional adjudication may not be necessary. Limiting constructions may be adequate to deal with discriminatory measures, as they have already been in the cases previously reviewed, those dealing with what the courts are willing to find authorized by the terms of state grants of authority to councils. If a limiting construction is not possible because authority has clearly been granted and exercised in a discriminatory way, and *Poudyal*-type deference is absent, constitutional violations might be found and remedies devised, based on available doctrine in analogous fields. As they encounter these cases, courts might be able to find in established judicial limits on OBC or son-of-the-soil preferences compelling sources of analogies and might opt for rules of reasonableness or of proportionality located in or inferred from generally applicable constitutional provisions. The Sixth Schedule does appear, however, to present

a very different way to treat Scheduled Tribes from other protected classes, and the courts may be diffident about borrowing too liberally from analogous methods of limiting abuse from areas that lie outside that Schedule.

There is one additional source of uncertainty concerning the customary inventiveness of the Indian courts. Since 2022, there has been a visible effort on the part of the Modi government to intimidate the courts, especially the Supreme Court, and in some cases there is evidence that the Supreme Court has trimmed its sails somewhat to accommodate the executive. If this continues, prospects for the requisite degree of discretion to reduce the arbitrariness of devolution arrangements may be diminished. If, however, the impulse to executive interference is controlled, courts might be able, over time, to reduce the dissonance between what has been possible pursuant to the Sixth Schedule and what is prescribed regarding the generally applicable rights found in articles 14 through 16 of the constitution. If they could only harmonize these divergent constitutional sources, they could make emphatically clear that India truly has only one constitution. It is a big *if*.

Nigeria's Entrenched Discriminatory Regime

I emphasized earlier that Nigeria's discriminatory regime originates in its historically founded desire to prevent any single group from dominating the federal government. Its constitutional requirement that cabinet ministers be drawn from groups indigenous to each of the states necessitated a definition of indigenousness and resulted in determinations, often contested, of the identity of the group(s) indigenous to each state. From this grew distinctions between those who are and are not included within the privileged category, even down to the local government level. Sharp conceptions of inclusion and exclusion—and multiple discriminatory practices—flowed from what began as a provision intended to prevent capture of the federal government by a single ethnic group. Good intentions have gone seriously awry.

Proposals to permit migrants to states to establish status equivalent to that of indigenes after a 5- or 10-year period of residence in the state or local government authority (LGA) might ease the problem created by the indigenous standard to achieve full rights, but the residence periods proposed are very long, and the proposals still contemplate retention of discrimination based on indigenousness, in clear conflict with the constitution's equal rights, anti-discrimination, and freedom of movement and residence guarantees. In addition, the current system and the proposals to modify it are both susceptible to arbitrariness and corruption in their enforcement. The proposals for

change, although supported by some segments of the Nigerian elite, have recurrently run into obstacles to adoption.

Bolder proposals for constitutional amendment to alter at a single stroke the entire system of categorization of citizens into advantaged and disadvantaged types might seem warranted, but they would be resisted, precisely because of the considerable advantages the current arrangements offer to those designated as indigenes. As we have observed, proposals to abolish the indigeneity distinction were ignored early on. Since significant numbers of people have been willing to fight and die for the cause of indigenous privileges, it seems safe to say that vested interests and the politicians who serve them would resist abolition at a single stroke.

It seems clear that a broad challenge to the edifice of indigenous preference in the courts would be equally futile. Even though the full scope of that preference regime is not visible in the text of the constitution, it is apparent that something beyond indigenous preference in the federal cabinet was contemplated at the time of the constitution's framing. Objections to such a regime were raised in the constitutional deliberations, as noted earlier, and were disregarded. Political interests then solidified around them, and—at least equally important—the constitutional pedigree of the indigene-non-indigene distinction is visible from the history of its adoption to all judges who would be called upon to declare it unconstitutional. Not coincidentally, a broad challenge has rarely been attempted, and it would not succeed.[54]

The only successful legal challenges have been the cases involving the truly egregious discrimination discussed previously, in which long-serving LGA employees were ordered to be transferred, on grounds of their non-indigeneity, to what was considered their home LGA. The prospect of their unemployment after lengthy periods of service, on grounds so obviously arbitrary, led to the Supreme Court's unanimous invocation of the generally applicable constitutional prohibition of discrimination based on ethnicity or place of origin as the reason for declaring the initiating state's transfer order to be unconstitutional.[55]

Those cases suggest an alternative path to abolition, one involving what Thomas Schelling called "salami tactics"[56]—one slice at a time. The indigeneity preference at state and local levels derives from a not-fully-articulated decision in the framing of the 1979 constitution, and its origins reside in the apprehensions of the 1940s, 1950s, and 1960s that we reviewed earlier. Its

[54] See *Garba & Ors v. Federal Attorney General & Ors*, discussed briefly in Chapter 6.
[55] As well as the Industrial Court's decisions in the two cases that followed, all discussed in Chapter 6.
[56] Thomas Schelling, *Arms and Influence* (New Haven: Yale University Press, 1966), p. 66.

constitutional pedigree does not mean that every application of the indigeneity privilege by a state or an LGA can be justified on constitutional grounds. The murkiness of what was intended or should be inferred from the decisions in the drafting committee and the CA many decades earlier should certainly open up the question of how far discriminatory practices that affect the lives and fortunes of non-indigenes deserve immunity from constitutional scrutiny in the face of the actual document's explicit professions of equality. The Federal Character Commission's flexible alternative definition of an indigene, referred to earlier, as someone who has been accepted by the relevant local authority, could certainly help courts understand that the most rigid meanings of the term need not be accepted. Perhaps it could open the door to evidence of the extent to which people classified as non-indigenes in a particular LGA were actually "accepted" there. While the term indigene is defined, acceptance by an LGA is not and might be proved in a variety of ways. This is a promising method for incremental change.

A litigating strategy that did not challenge every aspect of indigenous privilege at one time but focused on multiple challenges to some obviously unjustified specific disabilities enforced against non-indigenes in a single state—for example, complete ineligibility for long-resident non-indigenes to own land or to receive scholarships at public universities—might very well yield fruit, as courts in a single state could strike down those arrangements. They and other specific applications of non-indigenous exclusion could then be challenged elsewhere.

Once the severity of the consequences of indigenous preferences became part of the leitmotiv of judicial decisions and a number of the most extreme applications of preferences had been struck down in various states, it might well occur to state and local officials to scale down their scope—that is, their application in various domains—and perhaps also the extent to which the preferences exclude non-indigenes in their jurisdictions altogether from important opportunities. After all, there is already variation among states in the exact contours of what opportunities are off-limits to non-indigenes and, in some states, in their eligibility for equal access after a long period of residence in the state. In some, non-indigenous women can acquire the indigenous status of their husbands. Indeed, it is possible to imagine reciprocal interstate agreements to lower barriers to acquiring indigenous status or to reduce the scope of indigenous privileges in which ethnically similar populations enjoyed opposite statuses.

If there were some initial scaling back by courts, it might be understood that states or LGAs insisting on the most wide-ranging and extreme applications could invite determinations of their unconstitutionality. By this

point, too, public opinion might begin to doubt the wisdom of indigenous preferences, and eventually some legislative intervention might occur to scale them back further by statute or, eventually, to consider constitutional amendment. And eventually, too, even a broader judicial challenge might succeed.

Of course, this is an optimistic view. At most, it identifies a possible path but perhaps an improbable one. A litigation program would benefit from at least minimal coordination of activities among opponents of the preferences, so that actions are sequenced logically, and it assumes that the courts would be willing to declare the most extreme practices to violate the constitution. This course could easily be upended by excessive ambition of litigants or a resounding early defeat in the Supreme Court.[57] It also assumes patience on the part of representatives of the non-indigenous victims.

The likelihood of such a strategy and its possible success is hard to assess in advance, but we have already witnessed evidence that the courts have no inclination to extend these preferences beyond those already widely practiced. As *Lafia* indicates, the judiciary might well be receptive to incremental challenges. The Nigerian courts might, in the end, favor the explicit rights provisions of the constitution over specific exclusionary practices that, by contrast, never received fully developed official sanction in the constitutional text. The equality provisions are explicit; the scope of the exceptions is not. On the most optimistic side, one can imagine the Nigerian courts echoing A. P. Herbert's fictional judge, Lord Mildew, who declared: "If Parliament does not mean what it says, it must say so!"[58]

Malaysia's New Understanding and Persistent Challenges

The inability of the civil courts to deal with state-level discrimination in Malaysia flowed from the upgrading of the state Syariah courts and a constitutional provision designed to insulate their exercises of Syariah jurisdiction from interference by High Courts in the secular system. The insulation created numerous lacunae in which whole categories of non-Muslim and ex-Muslim litigants were denied effective relief from discriminatory practices that prevented enjoyment of their constitutionally protected rights. Once it

[57] For opportunities and difficulties in sequencing reform litigation, see Donald L. Horowitz, *The Courts and Social Policy* (Washington, DC: Brookings Institution, 1977), pp. 40–42. Egregious cases sometimes call out for judges to "do something."

[58] A. P. Herbert, *Uncommon Law* (London: Methuen, 1959), p. 192.

became clear that insulation of Syariah matters properly within the jurisdiction of those specialized state courts did not preempt the secular courts from passing judgment in cases implicating constitutional rights, those rights, at least in litigated cases, could be restored within the secular system.

Over time, judicial decisions may help to generate or, in this case, regenerate the original understanding of constitutional structures and limitations. In recent decades, however, a competing understanding has emerged, one that rests on a fundamentalist Sunni-Muslim conception of law for an Islamic society. Out of this understanding grew an expansive view of the Syariah courts and a restrictive view of the place of non-Muslims in the society. These views were given expression in civil society organizations intended to propagate them and to conform public practice to them.[59] Some of these organizations became convinced of the existence of a Christian plot to convert Malay Muslims—and Malaysia itself—to Christianity, and cases involving conversions, of the sort we have already discussed, accordingly became extremely controversial on both sides. Christians demanded their constitutional rights, while a number of Syariah-oriented Muslim organizations and politicians saw these claims as a denial of what they saw as Islam's special place in the polity. Other organizations, some with many distinguished Muslim members,[60] took a more positive view of the secular constitutional order, one eventually affirmed, as we have witnessed, by the federal judiciary.

There is no doubt that the Malaysian constitution is indeed secular, but decades of governmental support for the advancement of Islam, edging over into Islamism, have made this a heavily contested proposition, based on misinterpretation of the provision making Islam "the religion of the Federation."[61] We have explored this history in Chapter 6, but political and civil society actors, JAKIM (the Department for Islamic Development), and the Syariah administrations in the states are unpersuaded. So, too, are many Muslims whose Islamic education has been heavily influenced by teachers who share a JAKIM-friendly persuasion. To be sure, with some exceptions, the federal courts, most of whose judges are Muslims, are now synchronized in their understanding, but acceptance of the law as laid down by them is far from unanimous.

[59] For a concise discussion, see Ahmad Fauzi Abdul Hamid and Che Hamdan Che Mohd Razali, "Islam and Its Racial Dynamics in Malaysia's 14th General Election," in Meredith L. Weiss and Faisal S. Hazis, eds., *Towards a New Malaysia? The 2018 Election and Its Aftermath* (Singapore: NUS Press, 2020), pp. 149–69, at pp. 150–56.

[60] For example, the Group of Twenty-Five, a body of retired civil servants and diplomats who challenged the extent to which Syariah had been preempting constitutional law.

[61] 1957 Constitution of Malaysia, as amended, art. 3(1), which must be read with the uncontested history of that phrase in the creation of the constitution, together with the remainder of article 3(1) and with article 11, both providing for freedom of religion.

The problem, it should be noted, does not derive entirely from devolution in a federal system. The original misinterpretation came from politicians and Islamists operating at the national level as much as at state levels. The state Syariah authorities, in which religious matters were intended by the constitution to reside, were convenient repositories for mistaken constitutional doctrine, reinforced by guidance from the national JAKIM authorities[62] and by unduly expansive understandings of the jurisdiction of the Syariah courts.[63] The same misinterpretation would undoubtedly have occurred if Malaysia had been a unitary state, but the fact that it was federal and that Syariah jurisdiction resides in the state Syariah courts greatly complicated, and still does complicate, rectification of the misrepresentation. In spite of the understandings of Malaysian secular courts, the embedded counter-understandings of Islamists, JAKIM, and state religious authorities, and many politicians, especially but by no means exclusively in the Islamic party PAS, will continue to roil attempts to forge a consensus concerning the rights of ethno-religious minorities.[64] The courts may continue on a path of vindicating constitutional rights, but it is tempting for some ethnic activists, Malay-Muslim politicians, and even mistaken judges to proceed back down a very different path.

Indonesia's Longstanding Rule-of-Law Deficit

Much of Indonesia's ethnic and religious discrimination grew directly out of devolution itself. Once powers were to be devolved to newly created regions, struggles began to control those regions, and the winners gained the ability to disfavor others. The central government responded to many conflicting claims to control the new regions by dividing regions and so greatly increasing their number.

Uncontrolled national-level religious movements, mainly of an extremist and violent sort, contributed directly to those struggles in certain regions.[65] The central government and the courts, slow to rectify these problems,

[62] There is a respectable body of legal opinion that, because Islam is a state matter under the constitution, JAKIM may be an *ultra vires* federal department.

[63] Beyond what was required by a fair reading of article 121(1A) concerning the scope of the jurisdiction of the state Syariah courts.

[64] In 2021, a memorandum of understanding was agreed between a new government and the opposition in the Malaysian parliament. Among its commitments was support for judicial independence. Andrew Harding and Dian A. H. Shah, "Governance by Memorandum: Constitutional Soft Law in Malaysia," *I-CONNECT Blog*, November 13, 2021. That government, however, was voted out of office in 2022, but most of the ruling post-2022 coalition would undoubtedly agree with the content of the memorandum.

[65] Most notably, perhaps, on the island of Ambon, where very serious ethno-religious violence raged between 1999 and 2002. See, e.g., Karen E. Schulze, "Laskar Jihad and the Conflict in Ambon," *Brown*

allowed them to proliferate and express their hostility to minority religions practiced in regions that were inhospitable to them.

There is a geographic element to the cleavage between Islamists and pluralists. The former tend to be concentrated in regions with long histories of religious orthodoxy, such as Aceh, South Sulawesi, and West Java, and in some cases histories of rebellion against the Dutch and the early post-independence regime. These are areas in which discrimination against Christians, heterodox Muslims, and adherents of other religions continues.

As we have observed, the courts have performed poorly in securing compliance with constitutional norms. Even when courts have managed to intervene, disobedience to judicial decrees has been common. While it is true that unlawful Syariah regulations are more rarely promulgated than in the early days of devolution, that is not because of judicial action. The political benefits simply declined. On the other hand, religious intolerance at odds with constitutional guarantees has not abated.

In upholding the mostly secular order of the new constitution,[66] the courts have been unreliable agents. This has not been because of the sort of political pressure and skewed judicial appointments that became common in Malaysia after 1988. On the contrary, after the publicity of cases of judicial corruption, Indonesian authorities became more careful in appointing professionally well-qualified judges, especially to the Constitutional Court, whose integrity had been compromised. There is, however, little evidence of consistent development of constitutional doctrine concerning minority rights in the Constitutional Court, and the Supreme Court remains unreformed, as I have pointed out. Indonesia has not gotten its judicial house in order, and the growing role of religion in its elections suggests it will not soon ameliorate its problems of discrimination. Indonesia provides a vivid illustration, by its absence, of the extent to which rights protection depends on clear and consistent doctrinal development in the judiciary.

It is difficult to imagine a reform of the Indonesian judiciary that will make it a more effective instrument of rights protection. Multiple Indonesian and foreign bodies (Indonesia's Judicial Commission, United Nations Development Program, United States Agency for International Development, and others) have been involved in reform efforts since 1998, with little discernible effect, partly because of the lack of cooperation of the courts. In 2023, a new effort was launched by the Indonesian government, but it quickly

Journal of World Affairs, Vol. 9, no. 1 (2002), pp. 57–69. There was, however, warfare in other provinces as well.

[66] Albeit one that acknowledges in the preamble to its constitution the importance of belief in "the One and Only God."

became apparent from the arrest of 2 Supreme Court justices on corruption grounds and an anti-corruption investigation involving 17 Supreme Court functionaries that rooting out corruption would be the first order of business, as it had been earlier with the Constitutional Court.[67] That job is urgent. Despite a quite competent working group on recruitment and oversight of the judiciary, the quality of judicial decisions may have to wait still longer to receive attention.

Under the circumstances, a path to rights protection in the courts will not be assured anytime soon. Politicians at the national level, on the other hand, may come to recognize that the degree of ethno-religious strife that has been unleashed is not in their interest. They certainly had this idea firmly in mind at the time they overhauled the Indonesian constitution between 1999 and 2002, when they vanquished nearly every trace of religion in the constitution. Since that time, they have become vulnerable to the actions and demands of several extremist groups that have taken advantage of the weakness of the courts to pursue their agendas. Indonesian politicians of all parties know how to cooperate when it is in their interest to do so. They pushed the military out of politics and defeated several threats to their democracy after the fall of Soeharto. The only question is whether and when they will see it in their interest to prevent discrimination against ethnic minorities.

Kenya's Reform Possibilities

In Kenya's case, as in Indonesia's, the creation of a new regime of regional autonomy allowed ethnic groups (and even subgroups) to seize local authority and prevent others from sharing in positions and perquisites. And in Kenya, too, the judiciary was slow to understand and adopt procedures to redress discriminatory practices. All of this is particularly ironic, because Kenya, with its experience of local and provincial ethnic violence, gave more than usual attention, in its constitution and local government law, to the need for moderating ethnic conflict. The Kenyan constitution is unequivocal and, on matters of ethnic equality, difficult to misunderstand. The shortfall in its accomplishments lies in enforcement of rights and specifically in what should be readily correctible problems of procedure and evidence and judicial education.

The inability of litigants to secure evidence to support their claims of discrimination, coupled with the reluctance of courts to order trials at which

[67] *Jakarta Post*, May 29, 2023.

relevant evidence might be adduced, is conducive to inaccurate judicial determinations. As we have seen, it is open to counsel to secure some documentary evidence at preliminary stages of litigation, but the opportunities seem rarely to be taken. Embedded habits of the bar and judiciary are hard to break. Although procedural rules can be amended, it may be unrealistic to expect lawyers and judges to alter standard operating procedures to handle problems that have arisen in a single area of adjudication.[68] And, despite the constitution, conventional, biased understandings of the privileges of groups claiming to be indigenous to an area have crept—and in some cases leapt—into judicial determinations. So, beneath the technical issues, Kenya's constitutional enforcement may be swimming against what could be fairly widespread conceptions of group priority among judges.

Yet Kenya has flexibility in responding to discrimination in devolved units. There is no need to rely completely on courts. Oddly enough, Indonesia's experience with its judicial system could be relevant for Kenya. Dissatisfaction with the performance of the ordinary courts in Indonesia has led to the creation of a number of specialized courts. In addition to the Constitutional Court, there are courts specializing in taxation, human rights, fisheries, anti-corruption, industrial relations, and commercial transactions. The rationale for their creation is the need for specialized knowledge of the field in which each operates, but underlying this is the desire to avoid adjudication in the courts of general jurisdiction, including the Supreme Court, which, due to corruption and other ills, fails to provide "legal certainty."[69]

The specialized Indonesian courts typically have a majority of non-career judges, generally experts in a particular field, who hear cases, unburdened by reputational disabilities that plague many professional judges in courts of general jurisdiction. The record of the specialized courts is mixed, for some have succumbed to the same practices that have hurt the performance and reputation of the ordinary courts. Some specialized courts have, however, been more successful in developing expertise and achieving reliable results that meet with public approval.

Nothing we have seen in Kenya would indicate a need for anything like the Indonesian degree of dispersion of the judicial function among an array of specialized courts. The Kenyan courts have not failed very generally to uphold the rule of law as the Indonesian courts have often done. But if the

[68] It is impossible to believe that the inability to prove meritorious cases through affidavits drawn from the claimants' side is unique to discrimination cases. There must be other areas in which relevant evidence is in the control of defendants.

[69] Melissa Crouch, "The Judicial Reform Landscape in Indonesia," in Crouch, ed., *The Politics of Court Reform: Judicial Change and Legal Culture in Indonesia* (Cambridge: Cambridge University Press, 2019), pp. 1–26, at p. 19.

problem of redress for discrimination lies in the inaptness of Kenyan procedure for surfacing relevant evidence in discrimination cases and the lack of judicial expertise in this field, as well as occasional or perhaps more-than-occasional instances of local bias, there would appear to be a cogent case for a specialized tribunal. This need not be a court; it could be an administrative commission with its own legal staff and its own hearing officers (with protections for their independence), all trained to understand patterns of ethnic discrimination and the evidence required to prove or disprove it. A set of procedural and evidentiary rules could be laid down, and provision could be made for enforcement and for judicial review. Judicial review could perhaps be limited to whether there was evidence to support the commission's determinations and whether the determinations were in accordance with law—in other words, eliminating the possibility of arbitrariness on the part of the commission but without conferring on the courts the jurisdiction to relitigate the factual matters before it, once there was a showing of procedural regularity by the commission.

Kenya's constitution and its local government statute express unmistakably high expectations about the need for ethnic equality. There is no ambiguity in the constitution about these commitments, despite the prevalence of ethnic politics in Kenya. Two Kenyan commissions, described previously, already operate in this field or in fields related to it, but they operate mainly prophylactically. As we have learned, even when they hear complaints, they are without enforcement power, which resides in the courts. The Kenyan legislature might confer enforcement power on one or the other of these commissions or on a newly constituted body.

The high expectations reflected in Kenyan law and the bodies already created have not been fully satisfied by adjudicatory results. An expert commission, with different procedures and the ability to uncover relevant evidence, but with a clear mandate to follow the law, might be expected to produce reliable determinations. One could, for example, imagine that the commission might establish a rebuttable presumption of a violation if there were evidence of ethnic monopoly or duopoly in the distribution of positions in a county with numerous ethnic groups—a problem in some counties—and it could use expertise currently lacking in the courts to uncover and evaluate evidence to demonstrate the existence or absence of discrimination. A commission might be able to process more cases, more expeditiously, than can be processed by courts that have significant backlogs in their dockets.

Yet judicial management of the problem, after all, cannot be foreclosed. It is possible that the Kenyan bar and/or judiciary will consider the need to rectify the inadequacies of procedural rules and practices for discrimination

cases and to devise and implement changes. Procedural rules in Kenya's civil cases are promulgated and amended by a Rules Committee chaired by the chief justice. Those in constitutional cases are under the control of the chief justice and could be altered by her, acting alone. If rules and practices were altered to encourage discovery and in-person testimony, there might then be very little standing in the way of vigorous enforcement of Kenya's constitutional commitments to non-discrimination, with the possible exception of bias on the part of some High Court judges immured in their local culture.[70] That problem could be corrected by altering judicial assignment practice or jurisdiction and venue requirements. If such a reform were produced, decisions could be based on accurate determinations in individual cases, rather than on pleadings and affidavits that so often produce allegations but do not and cannot provide the evidence required to reach such determinations, as they have done for too long. Kenya is a country with relatively easy paths to a considerable measure of remediation.

The Divergent Sources of Problems

In some countries, then, the origin of the problem lies in a particular constitutional design, or even a single constitutional provision, intended to solve a genuine problem, created—or misinterpreted or misapplied to create—an entire complex of problems resulting from ethnic or religious discrimination. That is certainly an apt description of the origin of Nigeria's problem. A phrase, "indigene of a state," needed to produce a heterogeneous national cabinet, was then expanded downward into the states themselves, to create categories of indigenes and non-indigenes, with varying rights and privileges. A similar description applies to India's exceptions to general constitutional provisions for tribals under the Sixth Schedule, an incoherent mix of traditional tribal government and modern devolution,[71] which bifurcates citizens into privileged Scheduled Tribes and others. Ethiopia's constitutional design cannot provide the freedoms that are promised. The design is based on ethnic homelands, but in the context of territories that are heterogeneous and central government institutions that have generally not been allowed

[70] A 2022 survey found Kenyans equally divided on whether the Kenyan judiciary is "independent and impartial in rendering justice to citizens." International Institute for Democracy and Electoral Assistance, "State of Local Democratic Governance in Kenya," Abridged Report, Stockholm, 2022, pp. 18–19.

[71] See Kavita Soreide, "Representing the (Imagined) Majorities: Local Governance through the Autonomous District Councils—A Case Study of Meghalaya," Nehru Memorial Museum and Library Occasional Paper, New Series no. 65, New Delhi, 2020.

by political leaders to mitigate and adjudicate these problems.[72] In all three cases, contradictions in drafting cast a pall on constitutional rights. In all three, the origin of the problems resides in constitutions and—in varying respects—their conflicting promises.

In Indonesia and Malaysia, by contrast, relatively innocuous provisions inserted into constitutions have had, because of the way they were construed, large, unanticipated consequences for the rights of ethnic and religious minorities. In Indonesia, it is concern in the constitution for "morality, religious values, security and public order"[73] that has sometimes been allowed to swallow the broad, unqualified religious freedom clauses. But it has, at least equally or even more, been the inconsistency of judicial doctrine, with its only sporadic protection of minority rights, and—especially—the failure of the courts to do their job in reviewing unlawful regulations, that have exacerbated the problem of discrimination. Devolved authority, unfettered by institutions that should have adapted to confront the problem, instead allowed it to grow. In Malaysia, an excessively broad interpretation of article 121(1A) on Syariah court jurisdiction, crimping the jurisdiction of the civil courts and their ability to adjudicate the constitutionality of state Syariah laws and practices, often eviscerated the rights of religious minorities. In both countries, courts were the culprits, but the errors could be—and in Malaysia mostly have been, at least for now—corrected by the judiciary.[74]

Kenya's failings are of a different order, namely the inaptness of the procedural regime to identify and rectify discrimination, compounded, as I have said, by cases of apparent local bias in the courts. Procedural and evidentiary problems should be the easiest to resolve of those we have encountered. They are not embedded in the constitution or in fundamental misinterpretations of some provisions, and only marginally in failures to understand constitutional requirements.

It is tempting to use the label *rule-of-law deficiencies* broadly to describe what has gone wrong in all six of these countries. That label certainly describes Ethiopia's deep difficulties and Indonesia's very serious failures, but it would do violence to the overall, if imperfect, picture of judicial fidelity

[72] In 2021, a National Dialogue Commission was established in Ethiopia. Modeled on earlier such ventures in Tunisia and Yemen, the Commission may need to deal with an array of ethnic and territorial disputes. For some of these, see Zelalem Shiferaw Woldemichael, "Can the Current Constitutional Framework of Ethiopia Be Used to Bring about a Sustainable Solution to the Border Dispute between the States of Tigray and Amhara?" IACL-AIDC Blog, February 21, 2023. The commission's work may eventually lead to constitutional revision, but the obstacles to constitutional change are formidable, as I have said previously.

[73] 1945 Constitution of Indonesia, as amended, art. 28(J)(2).

[74] Problems of ethnic discrimination, as I have noted earlier, are more uniformly national in origin and derive from or tend to be justified by interpretations of article 153 of the federal constitution.

to law visible in Nigeria, India, Malaysia, and Kenya. Owing to constitutional structure, Nigerian and Indian courts have had to deal with intractable problems. Malaysia was forced to cope with a serious intrusion into judicial integrity, which was followed by misrepresentations of the meaning of constitutional clauses, initially by politicians, and it took considerable time for the judiciary to correct them by a turnaround as remarkable as it may be precarious. Kenyan courts were presented with some unfamiliar problems that were hard to solve within the confines of their customary rules and procedures, but they managed to fail to solve them with much greater frequency than could be expected. The law articulated and enforced by the courts may not have been adequate to provide redress, but in several of the six countries it is possible to envision paths to correction.

Of course, this is not just a matter for the courts. Public support will be indispensable,[75] and in some cases it may not be forthcoming, especially if interested politicians see the changes as threatening. The delegitimation of ethnic discrimination and violence requires the collaboration of other institutions as well, most notably unbiased police forces and national governments that are supportive. In the next chapter, we will note two cases of anti-discrimination law that rather quickly had their intended effect. But the courts and other adjudicatory bodies have an indispensable role to play.

There is a set of rule-of-law issues that relates to local, rather than national-level, correction of problems. Undoubtedly, many problems of discrimination could be dealt with within the units in which they arise if legal competence were better distributed at that level than it apparently is in some countries. Dawn Walsh points to the legal incapacity present in the devolved government in Gagauzia, which affected the power to exercise control over education and over state property, creating disputes over privatizing enterprises.[76] Perhaps this is an extreme example, but it calls attention, once again, to the need for devolution schemes to focus on the soft legal infrastructure and capacities inside devolved units.

[75] See Gretchen Helmke, "Public Support and Judicial Crises in Latin America," *University of Pennsylvania Journal of Constitutional Law*, Vol. 13, no. 3 (2010), pp. 397–411; James L. Gibson, Gregory A. Caldeira, and Vanessa A. Baird, "On the Legitimacy of National High Courts," *American Political Science Review*, Vol. 92, no. 2 (1998), pp. 343–58.

[76] Walsh, *Self-Government as a Conflict-Management Tool*, pp. 151–53. See also Suberu, "Federalism in Africa," p. 79, on disobedience or misinterpretation of judicial decisions.

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9
The Evolution of Devolution

If we consider the three parts of this book together, we find from Chapters 1 and 2 that federalism and regional autonomy might have a number of quite benign effects on ethnic-group relations in the overarching state and in the devolved units. As we saw in those chapters, however, there are prominent obstacles to the decision to devolve power. One of these is the fear of separatism, secessionist warfare, and actual secession. But we also saw in Chapter 3 that secession is a very rare outcome, made to look more frequent by its erroneous conflation with the dissolution of the Soviet Russian Empire and events associated with it. In Chapter 4, we observed that the risk of secessionist warfare and even actual secession can be increased by vacillation, delay, and reneging on plans for devolution. We also were able to specify the causal conditions underlying successful secessions from 1990 through 2025. So, early, generous devolution appeared to be an appealing strategy for mitigating ethno-regional conflicts. But then, in Chapter 5, we witnessed a number of serious dysfunctions adversely affecting ethnic-group relations within devolved units. In Chapters 6 and 7, we reviewed very strong evidence of the difficulty legal institutions in several countries have had in redressing these problems, particularly ethnic or ethno-religious discrimination within those units. In Chapter 6, we focused on problems and conflicting provisions imported into constitutions that made redress extremely difficult. In Chapter 7, we identified difficulties created by courts themselves, albeit in one case a difficulty corrected by a revised and undoubtedly correct interpretation of a constitutional provision. In Chapter 8, we speculated on some paths toward judicial amelioration available in the interpretive armory of several Asian and African legal systems. Although use of these techniques could reduce the severity of some of the injuries inflicted by discriminatory provisions or practices, we could not confirm that these doctrinal resources or appropriate constitutional amendments would be sufficient to remediate all of the malign phenomena previously observed, especially the discrimination embodied in constitutions or even in customary practices mistakenly thought to be constitutionally sanctioned. They are, however, tools of mitigation.

From this brief summary it is clear that the a priori attractiveness of devolution needs to be assessed by its probable effects on the overarching state and its ethnic conflicts, and—this is a very serious *and*—on its probable effects in each of the devolved units. Moreover, the scope of its effects cannot be confined to the apparently helpful mechanisms enumerated in Chapter 2 that may be activated by devolution. Many effects will surprise decision-makers and will be detrimental to coexistence and peace in devolved units.

If this early assessment is not done, the costs in discrimination and violence within units can come to outweigh what would otherwise be the benefits that it is possible to derive from federalism or regional autonomy. Of what use is devolution, after all, if, inside devolved units, ethnic discrimination and lawlessness are unchecked, or devolution is adopted to placate the most troublesome groups, while ignoring the interests of others in the immediate vicinity? Measures need to be taken in advance to make devolution work fairly in these circumstances. The perils must be taken as seriously as the promise.

In this chapter, I reevaluate some of the hypothetical mechanisms specified in Chapter 2 that were thought to underlie the success of devolution, in the light of the pathologies that emerged in Chapter 5. Thereafter, I analyze the sources of judicial inability to provide fully adequate rights recognition when confronted with the serious discrimination that we pursued in some detail in Chapters 5 through 8.

The Failure of Certain Hypothesized Functions

If we return to the functions described in Chapter 2, we can see that two of the mechanisms cited as likely to contribute to the success of devolution as a conflict-reduction method had a single characteristic in common: devolution to a heterogeneous unit.[1] This characteristic, heterogeneous units, was the precondition for the most severe problems that surfaced in Chapter 5. In some cases, devolution did facilitate interactions among politicians from different ethnic backgrounds, as hypothesized, and in others a reduction in the field in which groups were operating did stimulate the emergence of subethnic cleavages or the ability of groups to create power-sharing arrangements. Very often, however, these effects did not occur or, if they did, they occurred

[1] These are number 4, allowing politicians of different groups to become familiar with each other before ascending to the national level; and number 9, facilitating interethnic power sharing, but others that entail devolution to ethnically heterogeneous areas might also produce conflict and discrimination, possibilities that need to be considered in advance of devolution.

in muted ways. What occurred instead was the domination of minorities (or sometimes majorities) by other groups in devolved units. Essentially, dysfunctions that were unplanned for precluded achievement of the motives hypothesized in Chapter 2.

To be sure, when there is a prearranged specific multiethnic task to be accomplished, such as pooling votes to keep the unit from electoral loss, as in some Malaysian states or the Western Cape Province in South Africa, then interethnic cooperation stands a chance of preempting conflict, but not where they do not pool votes but compete forcibly. Devolution without precautions against ethnic exclusion in the devolved unit becomes imprudent.

When it comes to inclusive power sharing, mechanism 9, the opportunities in Africa tend to be infrequent,[2] because Africa has so many small groups, even in many relatively small devolved units, as in Kenya, that inclusion in consociational arrangements is difficult.[3] Likewise, as we have seen from Laura Thaut Vinson's work in Nigeria, multiethnic units may stimulate power sharing, but in her cases some were not maximally inclusive. Beyond that, power sharing was arranged when the prospect of conflict was low, and it was not possible to arrange when conflict prospects were high. And in Kenya, too, local multiethnic oligarchies have formed to share power while excluding others.

The problems that arise in devolved units are most serious when they contain heterogeneous groups. Bipolarity is a condition particularly productive of conflict, but even where there is greater pluralism, discrimination and violence can upend a devolution plan. We have seen examples of this in Kenya in Chapter 5.

In Kenya, the deprived groups were not specified in advance. Who they are depends on the success of others in the same county in conspiring against them, and there is always the possibility, albeit almost never yet realized, that these configurations can change or can be unwound by a shrewd judiciary if presented with the evidence and able to interpret its implications.

That is not the case in either India's Northeast or Nigeria's Middle Belt states, both instances of devolution to heterogeneous units. In both, beneficiary groups are defined in advance in each unit. In India, the juxtaposition of Scheduled Tribes that are granted councils and governing powers

[2] Claudia Simons et al., "Power Sharing in Africa's War Zones: How Important Is the Local Level?" *Journal of Modern African Studies*, Vol. 51, no. 4 (2013), pp. 681–706.

[3] Vote pooling leading to compromise is a different matter, of course.

that accompany the grant, as against those Tribals, Scheduled or not, and other Indians who reside in the area over which the empowered Scheduled Tribes preside, coincides with the lines dividing the privileged and the deprived. The extent of the privileges Scheduled Tribes hold in their council can occasionally be subjects of adjudication, but, once appointed, the identity of the privilege holders and others is not, unless the solution is to create additional councils for those disadvantaged by the prior grant, in which case an additional juxtaposition of privileged and deprived may be created. The same polarity of privilege and deprivation is present in Nigerian states, in which the identity of those deemed indigenous is defined by state or local government authority (LGA) political authorities, leaving all others in each unit as predetermined victims because of their putative non-indigeneity. As in India's Northeast, the extent of the privileges may vary from place to place, but the respective identities of the privileged and the non-privileged are governed by the initial determination of local eligibility.

The result is a permanent gain and loss of privilege in these two cases, as it is also in Ethiopia (with few exceptions) by constitutional demarcation, in contrast to Kenya. There the place of a group in a county in which ethnic discrimination is prohibited can change with political alignments in the county or, better still, with the findings of a court determined to enforce the prohibition. Kenya's government may be faulted for failing to prevent discrimination, and its courts may be criticized for failing to uncover it, but India and Nigeria can be faulted for something more serious: the deliberate imposition of permanent statuses on two categories of citizens. In the Northeast Indian case, the imposition was in the service of the benign motive to improve the condition of Scheduled Tribes, whereas in the Nigerian case, it was in the service of the less-than-benign motive to benefit from a newly created status not intended originally for the purpose to which it has been put. In all three cases, disadvantaged groups have been deprived of effective rights recognition, but in Kenya without any constitutional warrant.

When we think of judicial remedies in India and Nigeria, however, they are necessarily designed to soften the sharp edges rather than to upend privileges that have constitutional foundations, explicit in the Northeast Indian council cases, only implicit but well understood in the Nigerian state-level designations of indigeneity. When we consider the difficulty of undoing them in each of these countries, the hard-core obstacles are courts that cannot unwind constitutional provisions, especially given the massive consequences

likely to follow, and politicians who benefit from the provisions. In Kenya, by contrast, the constitution framers have done their job, but the courts lag prominently behind, as they formerly did in Malaysia as well and still do in Indonesia.

Effective Rights Recognition

The potential role of rights, as opposed to constitutional structures, such as federalism or separation of powers, in mitigating conflict has been greatly neglected in studies of severely divided polities. Mitigation of conflict in such polities has been occupied almost entirely by constitutional design or proposals for power sharing. Ethnic conflict has rarely been conceptualized as entailing ethnic discrimination, although discrimination is its most common manifestation. Legal inequality or other forms of officially sanctioned inequality are entrenched at the collective level, but they commonly bite at the individual level. That is why they may be vulnerable to attack in the courts, sometimes successfully, often not, as we witnessed in the last several chapters.

What we have seen is that discrimination against minorities is common in autonomous regions and states, especially where there are claims to an ethnic homeland. This has been true in Western countries, as it has in the Asian and African countries that are the main focus of this volume. Consider instances in which discrimination against regional minorities has been remedied and those in which it has not (or has been remedied only in a few cases). The effectiveness of legal institutions accounts for the difference.

In Quebec, Francophones were long subject to invidious discrimination at the hands of the Anglophone minority. When the Parti Québécois came to power in the province in 1968, the tables were turned, as Anglophones became victims of discrimination that led many to decamp to Ontario. The most visible, but not the only, issue was the place of the French language for official and private business purposes. That issue came to a head with the passage of provincial Bill 101, called "the Charter of the French Language," which restricted commercial signs written in languages other than French. This portion of the statute was struck down under the Canadian Charter of Rights and Freedoms, adopted in 1982, on the ground that freedom of expression under the Charter allows Canadians to express themselves in the language of their choice.[4] Subsequently, a compromise was agreed that merely required French to be the predominant language, but not necessarily the only one, on signboards. The Canadian Charter provides for strong and enforceable

[4] *Ford v. Quebec (Attorney General)*, [1988] 2 SCR 712.

rights of citizens to be free of discrimination on grounds of ethnicity, race, or religion, and to reside anywhere in Canada.

Now let us turn to a more intense and lethal conflict, in Northern Ireland. A severely divided society, Northern Ireland was the scene of periodic face-to-face violence between Protestant and Catholic communities, and later terrorism, with thousands of casualties, during the time power was first devolved to a provincial parliament from 1921 to 1972. During this time, Catholics were subject to abundant discrimination, especially in public and private employment. Beginning in 1967, a Civil Rights Association began a movement for redress of grievances, and soon marches were organized to press for change. These actions were the prelude to political movements that at first produced a resumption of direct rule of the province from London and, after many years of proposals and negotiations, the Good Friday Agreement of 1998, which transformed governing arrangements under a devolved regime.

Measures against discrimination did not, however, await the post-1998 regime. In 1976, a Fair Employment Law was passed, as well as another in 1989, and an Equality Commission was created to enforce it.[5] Serious enforcement of the 1989 legislation convinced parties previously reluctant to engage in talks leading to what became the Good Friday Agreement of 1998 that a broader accommodation was possible in Northern Ireland. And so, effective anti-discrimination measures preceded and made possible adoption of the devolved regime.[6] In sharp contrast to the earlier situation, Catholics are now found at all levels of the civil service of the territory and in private employment as well, although not always in proportion to their share of the population.[7]

In one case, then, it was judicial action and in the other statutory development that undid discrimination. Of course, Canada and the United Kingdom had vibrant rule-of-law traditions that could underpin efforts to create and enforce anti-discrimination law. Yet, even though political differences between groups in both provinces were—and are—quite deep, especially in Northern Ireland, it did not take herculean measures to have a strong impact on discriminatory practices. In neither has there been a complete settlement of group claims. Ordinary legal redress has, however, been adequate to provide significant relief from discrimination.

[5] United Kingdom, Fair Employment (Northern Ireland) Act, 1976; ibid., 1989. See Geraldine Scullion, "Enforcement of Rights under the Equality Legislation in Northern Ireland," European Roma Rights Centre, Budapest, May 10, 2003.

[6] I am indebted to Christopher McCrudden for a lengthy and thoughtful email on January 6, 2024, explaining the sequencing and its significance to me.

[7] For an assessment, see *Irish Times* (Dublin), May 2, 2022.

In the countries on which we have been focused, a stronger legal regime devised to counter discrimination than we have encountered so far might be more attainable.[8] Our review of discrimination cases shows courts in India, Nigeria, Malaysia, and Kenya groping their way, in varying degrees of seriousness, with litigation over this dysfunction of devolution. There is no need to belabor the constitutional contradictions in India and Nigeria that confine courts to nibbling around the edges in most cases. In Kenya, put as neutrally as possible, problems of remediation are probably best described as deficiencies of legal infrastructure, methods by which existing legal institutions can recognize new problems and adapt their customary habits of thought and procedure to solve newly recognized problems.

Still, when discrimination has its origins in constitutional provisions, as in Ethiopia and India, or in constitutional "understandings," as in Nigeria, solutions are elusive, despite expansive general guarantees of equality and non-discrimination. A major reason is that important constituencies have interests in the status quo (favorable to them) that has been created, interests that are not overborne by concerns about equal treatment. In Quebec and Northern Ireland, there were significant constituencies, even across group lines, for equal treatment as a conflict-reduction method. A principal part of this problem, therefore, is the absence of countervailing normative outlooks on the part of politically significant fractions of members of groups benefiting from discriminatory behavior—a constituency sufficiently large that, when it demands reform or repeal of the offending provisions, it might actually be heard.

Legal guarantees and institutions, especially courts with the capacity to enforce the guarantees, can play a considerable part in assuring a larger measure of ethnic equality in such societies. The deficit in rights enforcement draws us back to studies of the connections of rights and political structures and the contribution that rights might make to interethnic accommodation when political structures are generally unable to do the entire job of interethnic accommodation on their own.

The relationship between political structures and legal rights recalls disputes concerning the ratification of the American constitution in 1787–88. Hamilton and Madison were famously skeptical of the independent importance of a bill of rights. They thought that a well-designed constitution, with

[8] Indeed, even the legal system of Bosnia, among the frailest and most conflict-prone consociations, with devolved components, has been able to police discrimination in employment, bank loans, and government services, while allowing dominant groups in its devolved units to enforce their own linguistic, educational, and cultural preferences. I am drawing here on an email communication from Damir Kapidžić of the University of Sarajevo, January 10, 2023.

balances among branches, would function to assure the rights of citizens against popular "passion" and elite conspiracies against the public.[9] Resistance to this view by the Anti-Federalists, among others, resulted in the adoption of the Bill of Rights.

Several studies of the efficacy of courts and rights guarantees especially commend themselves to our attention. In the first of these, Linda Camp Keith, who had been studying the effect of legal provisions on the effectiveness of rights,[10] published a multi-country examination of the effect of judicial independence and certain rights guarantees and found that both were associated with lower levels of actual rights repression. There was, she concluded, "overwhelming evidence that the formal commitment to individual freedoms and rights decreased the probability of broad civil liberties restrictions …."[11] Judicial independence was strongly associated with superior enforcement of a variety of rights,[12] and bills of rights were the key ingredients of a repression-reducing "package."[13]

Not all studies agree completely with Keith's findings on rights adoptions.[14] A major advantage of Keith's studies is the incorporation of the judiciary as an enforcing institution. An important limitation of the Keith study is the focus on rights to speech, press, assembly, association, and religion. The effect of equality guarantees, so pertinent to problems of ethnic discrimination, is not tested. And religion, so important to ethnic groups that may be differentiated from others by religious affiliation, Keith finds, is the one right least favorably influenced by judicial independence, although that is not the uniform view.[15] Nevertheless, the effect of rights guarantees and judicial independence on state behavior is an important starting point for their

[9] See *The Federalist* no. 84 (Hamilton), in Shapiro, ed., *The Federalist Papers*, pp. 430–39; no. 51 (Madison), in ibid., pp. 263–67. For a fine discussion of this question, see Jon Elster, "Limiting Majority Rule: Alternatives to Judicial Review in the Revolutionary Epoch," in Elvind Smith, ed., *Constitutional Justice under Old Constitutions* (Boston: Kluwer, 1995), pp. 3–21.

[10] See, e.g., Linda Camp Keith, C. Neal Tate, and Steven Poe, "Is the Law a Mere Parchment Barrier to Human Rights Abuse?" *Journal of Politics*, Vol. 71, no. 2 (2009), pp. 644–60; Keith, "Constitutional Provisions for Individual Human Rights (1977–1996): Are They More Than Mere 'Window Dressing'?" *Political Research Quarterly*, Vol. 55, no. 1 (2002), pp. 111–43.

[11] Linda Camp Keith, *Political Repression: Courts and the Law* (Philadelphia: University of Pennsylvania Press, 2012), p. 229.

[12] Ibid., p. 214. For some important correlates of judicial independence, see ibid., pp. 187–88.

[13] Ibid., p. 227. For some correlates of rights adoptions, see ibid., pp. 210, 228.

[14] See, e.g., Adam S. Chilton and Mila Versteeg, "Do Constitutional Rights Make a Difference?" *American Journal of Political Science*, Vol. 60, no. 3 (2016), pp. 575–89, a study using different data sources and finding some rights adoptions more likely than others to result in enforcement. A major difference between the studies is Keith's explicit incorporation of judicial independence, which Chilton and Versteeg speculate might make individual rights more effective.

[15] Keith, *Political Repression*, p. 229. In contrast, Chilton and Versteeg find a positive effect of the adoption of freedom of religion on government respect for religious rights. "Do Constitutional Rights Make a Difference?" pp. 582–83.

more serious consideration as key elements of interethnic accommodation and action against discrimination in devolved units.

That brings us to a pair of aggregate-data studies canvassing the effects of three clusters of variables on democracy and on peace.[16] The three clusters the authors call (1) "inclusive institutions," consisting of consociational guarantees at the central government level; (2) "dispersive institutions," meaning devolution and an upper house to represent the devolved units; and (3) "constraining institutions." In the "Safeguarding Democracy" study, constraining institutions refer to bans on ethnically based parties and on military representation in the legislature, plus protections of religious freedom, as well as judicial review, guaranteed judicial tenure, and judicial roles specified in the constitution. In the "Power Sharing, Protection, and Peace" study, the same term was defined somewhat differently to embrace human rights guarantees, freedom of religion, an independent judiciary, judicial review, and long tenure for judges. In both, however, constraining institutions, especially those associated with the judiciary, fared well.

Among the three clusters, the authors found in the "Safeguarding Democracy" study that only constraining institutions were positively related to democratic survival. (The inclusive cluster was found to be positively related to democracy only post-conflict.) The authors of "Power Sharing, Protection, and Peace" similarly found that only constraining institutions limit the incidence and recurrence of civil war. In both studies, the authors emphasize the effect of certain prohibitions on the ability of otherwise powerful actors to mobilize against others and, especially, the part played by rights guarantees and judicial authority. Although the somewhat heterogeneous character of the constraining institutional variables makes it a bit difficult, at first glance, to see exactly what is doing the work, the authors conclude that institutions that operate to protect individuals and vulnerable groups, as judicial institutions are designed to do, are the indispensable ones.[17] These are strong endorsements of rights and their enforcement.[18]

[16] Benjamin A. T. Graham, Michael K. Miller, and Kaare Strøm, "Safeguarding Democracy: Powersharing and Democratic Survival," *American Political Science Review*, Vol. 111, no. 4 (2017), pp. 686–704; Scott Gates et al., "Power Sharing, Protection, and Peace," *Journal of Politics*, Vol. 78, no. 2 (2016), pp. 512–26.

[17] I have benefited from a lengthy, helpful conversation about these matters with Benjamin A. T. Graham, who participated in both studies, in clarifying what specific variables within clusters of variables were actually doing the explanatory work.

[18] It should be noticed that neither study finds "dispersive institutions," namely devolution, to be positively associated with either the maintenance of democracy or of peace, and neither provides an account of why this might be so. A proper explanation would probably have to include the dysfunctional central government behavior examined in Chapter 4. Cederman, "Territorial Autonomy in the Shadow of Conflict," and other studies cited in Chapters 1 and 3 have produced quite different findings on devolution.

What has been missing in too many devolved units is a full-strength dose of the infrastructure of justice, replete with courts that are not restrained by contradictory constitutional provisions that make their job harder.[19] We shall turn soon to attempts to strengthen the dose.

That brings us back to explicit legal remedies, which these studies find most useful in supporting ethnic accommodation and democracy, more useful than devolution alone. In 2010, Al Stepan, Juan Linz, and Yogendra Yadav envisioned a national regime that had created asymmetric arrangements for ethnically differentiated groups, with shared power at the "polity-wide" level, from which beneficiaries of the devolved regime would benefit from a polity-wide "roof of rights."[20] That roof may not be built all at once, but there are incremental steps that have been and can be taken toward that end. But first, we need to know what a regime of rights is.

Rights and the Rule of Law

The indispensable starting point is this: A most important but insufficiently frequent realization is that territorially concentrated minorities in devolved systems require "the protection of rights … guaranteed at the national rather than provincial level."[21] Minorities, Vernon Bogdanor continues, need to have confidence in the rule of law.[22] And what, exactly, is that rule of law?

The rule of law is, as Martin Krygier wisely says, "a state of affairs," not a set of institutions, and its aim, he contends, is to diminish arbitrariness in the exercise of power; in other words, to "temper power."[23] This minimalist aim, reiterated by Krygier in many publications, can be contrasted with maximalist definitions that embrace "respect for the dignity, integrity, and moral

[19] David Cameron, "The Paradox of Federalism: Some Practical Reflections," *Regional and Federal Studies*, Vol. 19, no. 2 (2009), pp. 309–19.

[20] Al Stepan, Juan Linz, and Yogendra Yadav, "The Rise of State-Nations," *Journal of Democracy*, Vol. 21, no. 3 (2010), pp. 50–68. Oddly enough, the authors praise the special privileges of tribal groups in India, such as the Mizo, to vote in local elections and to buy land, two privileges that are denied to most of their non-tribal neighbors. Ibid., p. 61. Entry into Mizoram by non-Mizo requires a permit, and the Chakma tribal minority is subject to great discrimination in the state. If this is an example of the roof of rights, it seems rather leaky. That does not render a roof-of-rights project at all defective, but the volume from which the article above is abstracted does not describe the method for building the roof.

[21] Vernon Bogdanor, "Forms of Autonomy and the Protection of Minorities," *Daedalus*, Vol. 126, no. 2 (1997), pp. 65–87, at p. 80.

[22] Ibid., p. 82.

[23] Martin Krygier, "Tempering Power," in Maurice Adams et al., eds., *Constitutionalism and the Rule of Law* (Cambridge: Cambridge University Press, 2017), pp. 37–42. For nearly comparable simplicity, see Brian Z. Tamanaha, "The History and Elements of the Rule of Law," *Singapore Journal of Legal Studies*, no. 2 of 2012 (December), pp. 232–47.

equality of persons and groups,"[24] or other lists of juridical virtues. Between the most spare and the most compendious definitions, there are alternative characteristics cited by some: an emphasis on fairness, justice, predictability, and equality; or the qualities of clarity, stability, publicity, generality, and prospectivity.[25] The rule of law would be impoverished by neglect of any of these attributes or by its failure to provide an array of civil freedoms that permit private value-creating arrangements, including the opportunity to make binding promises, to start families, to cooperate in peaceful organizations, and so on. All of this shows that the rule of law is a capacious, imperfectly bounded domain, easily crimped by invasions from other domains based on alternative concerns and motives. Its teleology is not only to temper arbitrariness, important as that aim is, or to achieve any other single goal.

Given its multifaceted nature, it is unsurprising that it is difficult to prescribe how to "get to the rule of law."[26] The rule of law is more easily recognized by its deficiencies in any given case than by any perfect instantiation. And we have seen quite a few such deficiencies. By the same token, it is possible to identify improvements and the methods of their achievement. The most important of these are precautions taken by the central government in advance of devolution and after devolution once the worst dysfunctions have appeared. That means anticipating or, if necessary, responding to problems in devolved units and preparing with instruments of force and instruments of justice, the latter to include assured processes to adjudicate rights violations and careful examination of contradictory provisions and informal understandings in constitutions.

When such improvements take place, a complement to that aspect of the rule of law should also occur, as Bogdanor specifies. Confidence in legal protection should take root in the affected population. This is an important correlate of the rule of law: rule-of-lawness, a sense among those affected that there is what Brian Z. Tamanaha calls "a legal backdrop" in place that enables them to pursue their various activities without fear, based on their expectation that there is legal redress available should things go wrong.[27] In

[24] Philip Selznick, "Legal Cultures and the Rule of Law," in Martin Krygier and Adam Czarnota, eds., *The Rule of Law after Communism* (Aldershot: Ashgate, 1999), p. 26.

[25] See, respectively, Jane Stromseth et al., *Can Might Make Rights? Building the Rule of Law after Military Interventions* (Cambridge: Cambridge University Press, 2006), p. 56; Joseph Raz, "The Law's Own Virtue," Columbia Law School Public Law Research Paper, no. 14-609 (November 2018). See also the oft-cited attributes of the "inner morality" of law by Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964), pp. 38–39.

[26] The volume *Getting to the Rule of Law*, edited by James Fleming (New York: New York University Press, 2011), contains no general prescription to achieve that end.

[27] Brian Z. Tamanaha, "Functions of the Rule of Law," in Jens Meierhenrich and Martin Loughlin, eds., *The Cambridge Companion to the Rule of Law* (Cambridge: Cambridge University Press, 2018), pp. 221–36.

the chapters preceding this one, there have been many victims of policies and practices who, unfortunately, lacked any such confidence and trust.

There is no magic formula for getting to the rule of law. The key is repetition in performance, so that when law is needed, it is available. Bogdanor has put his finger on an elusive aspect. The central government needs to take responsibility for providing a roof of rights for those in devolved units and for not impairing those rights.

When law is available reliably, those subject to it will become habituated to its presence. Should it fail to appear, they will demand its restoration. Without it, their confidence wanes, and Tamanaha's sense of security declines. There is another support for the rule of law, and that is its institutionalization. Institutions are based on regularized procedures that make their interventions predictable, which is a support of reliability and, therefore, the growth of public confidence, and they create professional constituencies with interests in those procedures.

Arenas for Improvement

Courts are the most common institutions for improvement in performance. In the six countries examined earlier, however, two are not ripe for improvement. Interestingly, both had to fight for their independence, and neither prioritized judicial development afterwards. As I said earlier, Ethiopia needs a period of peace and the stand-down of militias before it can begin to discuss fundamental changes in the system of ethnic states or the development of serious rights guarantees and judicial enforcement. Indonesia's courts have a different problem that is most acute with its Supreme Court but increasingly pertinent to its Constitutional Court. At the time the constitution was fundamentally reformed following the fall of Soeharto in 1998, and a new Constitutional Court was created, an opportunity was missed to reform the courts. There were alternatives available to doing nothing or to doing a major reform. When the Kenya constitution of 2010 was being considered, there were two ways to evaluate sitting judges: either vetting them all or dismissing them all and reappointing only those who were competent and not corrupt. Kenya chose a vetting process.[28] Indonesia did neither. Without reform, neither court seems in a position to benefit from rule-of-law improvement. Consequently, we shall concentrate our efforts here on the four remaining countries—Malaysia, Kenya, Nigeria, and India—that stand some chance of

[28] Kenya, Vetting of Judges and Magistrates Act, no. 2 of 2011. I am indebted to Christina Murray for a discussion of the two Kenyan alternatives.

improving judicial performance, although there are limits to the ability of Indian and Nigerian courts with respect to provisions in their constitutions affecting legal rights of disfavored groups in their devolved units.

Perhaps we can proceed upward, starting with small, idiosyncratic steps, before identifying more comprehensive steps toward building the roof of rights. Some of the small steps I shall mention have been taken by courts themselves that enhance their authority. Some of these steps have been taken by the four courts whose work we have been assessing.

Rosalind Dixon has pointed out how an apex court can frame its decisions to encourage governmental actors and others to sense their affinities with the enterprise in which the court is engaged.[29] How powerful these rhetorical devices might be remains to be seen. In the same vein, a country's highest court may strategize to empower itself by the way in which it treats landmark decisions it hands down. According to Yvonne Tew,[30] that court can announce major doctrinal departures but minimize their immediate effects, saving them for later cases, in which they will not seem to be departures, because the doctrine has previously been announced. Beyond that, courts can show their solicitude for other branches by producing a favorable decision; they can decide a case in terms that accord with public opinion; or they can deploy unanimity of the bench to justify the most dramatic departures from previous decisions. The methods of innovative decision making advocated by Dixon and Tew to enhance prospects for success are essentially signals that courts are in charge and will be reliable companions on the road to the rule of law.

We have seen some of these strategies at work, but of course none of them is foolproof, and their effects may be ephemeral, depending on the political forces arrayed against the courts. In the *Indira Gandhi* case, discussed in Chapter 7, the Federal Court of Malaysia decided unanimously for the first time that there was a basic structure to the Malaysian constitution—as the Indian Supreme Court had decided earlier—and that it required that judicial review be lodged in the civil courts, with the Federal Court at the apex of the decision tree. So dramatic a legal innovation makes clear the judiciary's commitment. The basic structure doctrine allows the court great discretion to define its boundaries and to rule out institutions and practices deemed incompatible. It is a strong weapon against opponents of judicial

[29] Rosalind Dixon, "Strong Courts: Judicial Statecraft in Aid of Constitutional Change," *Columbia Journal of Transnational Law*, Vol. 59, no. 2 (2021), pp. 298–363.

[30] Yvonne Tew, "Strategic Judicial Empowerment," *American Journal of Comparative Law*, Vol. 72, no. 1 (2024), pp. 170–234.

review, and it lodges discretion in the highest civil court to find specific provisions embodied in the basic structure and, therefore, unalterable. Kenya's Supreme Court has expressly rejected the basic structure doctrine,[31] but it had earlier displayed judicial boldness when it annulled the 2017 presidential election and ordered the electoral commission to arrange a re-run,[32] a decision the sitting president declared to be erroneous and attacked vigorously, but found nonetheless necessary to obey.[33] Later changes in the mode of judicial selection have diluted the role of a judicial commission in that process, thus making the Kenyan courts somewhat more vulnerable to political intrusion, a serious impediment to a generous rule of law.

In India, the basic structure doctrine could not conceivably invalidate the council system of the Sixth Schedule that has been a part of the constitution since its inception. It could, however, be utilized to limit the extent of the discrimination authorized by those provisions. As I have argued, it could limit the grants of power to councils that are not specifically authorized by the Sixth Schedule but are provided by state governments. In many cases, the extent of seat reservations for the Scheduled Tribe that has been granted a council are prescribed by the states and could be made more reasonable in number. Similarly, there is nothing that requires exclusive access by Scheduled Tribes to land in the council's area of jurisdiction, and it could be made available for others to use as well. Nor is there anything pertaining to differential tax rates that discriminate against non- Scheduled Tribes, and a council's grant of authority or a court could exclude those.

In Chapter 8, we have also canvassed a range of interpretive techniques that have been or could be utilized to make Sixth Schedule grants of authority conform a bit more closely to Indian constitutional principles stated in the basic document itself or announced in cases arising under it: limiting or narrowing construction of powers authorized, rules of reasonableness, proportionality of reserved seats to group population, and a number of others discussed in the relevant case law considered in that chapter. A cut in Scheduled Tribe council privileges in the name of this sort of judicial harmonization might occasion violence in the affected area. Scheduled Tribes often use violence to gain a council and sometimes to prevent others from gaining their own council, as the 2023 violence in Manipur attests, and they might use the same means to protect aspects of the jurisdiction they thought were part of their entitlement. The skill in the judiciary would be in the way the

[31] *Hon. Attorney General & Ors v. David Ndii & Ors*, [2021] KESC 17 (S. Ct.).

[32] *Raila Odinga & Anor v. Independent Electoral Boundaries Commission & Ors*, [2017] KESC 42 (S. Ct.).

[33] At a later rally, he called the majority justices "wakora" (Swahili for "crooks").

trimmings were done, the council powers that were affected, and the cooperation of state governments in effecting the alterations. The aim of the Sixth Schedule was to provide a regime for certain Scheduled Tribes that differed from that available under what one might call the main parts of the constitution that prevailed elsewhere in the country. (Recall the discussion about whether India has one constitution or two.) Under these circumstances, it would not be amiss for courts to call attention to the fact that the Sixth Schedule, adopted in 1950, was intended by some drafters to be temporary.

It is worth reiterating that I am not speaking about hiving off provisions of the Sixth Schedule, only about limiting the number of reserved seats and the scope of other provisions that are not prescribed by the Sixth Schedule or by law but that might be specified in the particular granting documents for individual councils as they are established. The impact of these adjustments would not be revolutionary, but it would provide some relief to those residing in the council's territory but who are not members of the governing Scheduled Tribe or who may not be Scheduled Tribes at all. An additional problem of impact is that the Indian Supreme Court has an enormous backlog of cases, so almost any remedy provided by the court inevitably comes very late.

Nigerian courts might utilize similar techniques to reduce the harshness of the indigeneity discrimination that affects life chances profoundly within individual states and LGAs. The history of the idea that informs a constitutionalization of indigeneity at the state level does not include one form of discrimination and exclude another. Paradoxically, the greater the constitutional silence on the scope of privileges deriving from indigeneity in states and LGAs—and it is almost perfectly silent—the more complete the abrogation of rights has been in some of those devolved units.

Courts thus far have either declined invitations to invalidate the discriminatory indigeneity regime entirely or held that some applications of it (in the employee transfer cases, discussed in Chapter 6) are obviously in blatant violation of constitutional guarantees. They have ignored the regime's weak, merely implicit constitutional origins, so as not to confront a claim to invalidate the whole regime. They are being appropriately prudent in avoiding wholesale invalidation, because of the massive dislocation—and likely violence—that would create. Only a negotiated settlement of the problem by political leaders or a constitutional amendment of the sort already proposed[34] (perhaps using time as a resident to gain indigeneity for out-of-state migrants) can deal sensibly with a problem that disadvantages so many people. The very enormity of the injustice of the initial decision means—with a

[34] And discussed in Chapter 6.

bitter irony—that it cannot be unwound at a stroke, because of adverse consequences that are so easy to envision. Courts could point out that unwinding over a reasonable period of time might be considered by the legislature, even as they acknowledge their inability to do the job on their own.

Nigerian courts could use rules of reasonableness to prevent the most extreme forms of discrimination from surviving judicial review. Courts could reduce the harsh impact of those forms of discrimination that bear, for example, on ability to eke out a livelihood or gain an education, while leaving intact some of the forms that have less of an impact on those basic functions. Or they might grant indigenous status on plaintiffs who can prove, in accordance with the Federal Character Commission's definition of an indigene, that they have been accepted as such by the state in which they now reside. The courts' well-considered aversion to taking on the maximal challenge does not foreclose an appropriate judicial function in considering challenges to one or two pieces of the regime. It might not be difficult for courts to declare that in Nigeria express guarantees of rights take priority over understandings not exactly embodied in the constitutional text.

In Malaysia, we already know what the Federal Court has decided in the *Indira Gandhi* case with respect to the basic structure doctrine and the subordination of state Syariah procedures to the civil courts in judicial review matters. But what might it do with the contested matter of decisions of small numbers of Muslims to abandon their faith for another?

As in the *Lina Joy* case discussed in Chapter 7, such people usually find it very difficult to secure an official change of religion on their identification cards without having first secured a declaration of apostasy from their state Islamic religious council. In many cases, such a document does not exist, and in others procuring it would require undergoing a lengthy process to persuade the claimant to rescind the determination to leave the faith. It is likely that a case similar to Lina Joy's will be presented to the courts again, now that the civil courts can decide such matters as a function of judicial review. This is an exceptionally sensitive matter for Muslim opinion in Malaysia,[35] and the courts will need to use utmost creativity to resolve it fairly without producing a collapse of support for judicial independence among segments of the public and its representatives. They might well point out in their judgment how few cases there are of Muslims seeking such changes of religion.

And then there is Kenya, where there is a long list of cases in which claimants contend they have been victims of discrimination. Many of these

[35] There are some Malay Muslims who, misinformed by interested politicians, have come to believe that the constitution's guarantee of freedom of religion applies only to non-Muslims. Per contra, see 1957 Constitution of Malaysia, as amended, art. 11(1) and the drafting history discussed earlier.

seem to be plausible, given the skewed compositions of county councils or the offhanded, occasionally biased remarks of judges deciding against them. Yet the defendants are never asked to produce documents or testimony that might shed light on the issue or even to proceed to trial. I suggested earlier that a minor amendment or two to the procedural rules governing these cases could resolve the claims reliably. The chief justice controls the procedural rules in constitutional cases, and it is an interesting question why she has not acted to create greater verifiability of determinations in this class of cases by changing the rules. Alternatively, claimants' counsel could be more vigorous in demanding pre-trial disclosure of documentary evidence and an actual trial to determine the validity of a claimant's case. Or the judge could decide to conduct a trial. It should be an embarrassment that Kenya's constitution has abundant provisions against discrimination and two commissions dedicated to its eradication but has some courts that appear lethargic in turning to the same task.

The Impact on Judicial Independence

We have seen that the highest courts in Malaysia and Kenya have so far survived their major excursions into judicial activism, in the unilateral children's conversion case in the former and the presidential election re-run case in the latter. A change in Kenya's rules for adjudicating county discrimination cases would certainly raise no questions about judicial independence, but decisions in other areas might, and greater judicial activism in India, Nigeria, or Malaysia could unsettle relations with political authorities.

In India, there could be problems with the executive, since national political parties have benefited from the support of Scheduled Tribes when they or their state chief ministers have agreed to create new councils. In contrast to the past, when the Congress Party ruled India alone or in coalition with state-level parties, the prime minister, Narendra Modi, has been feuding with the Supreme Court for some time, because he wishes to play a role in selecting judges of that court. The Supreme Court has declared a previous attempt to make participation of the executive more prominent in judicial appointments a violation of separation of powers and judicial independence and an unconstitutional constitutional amendment.[36] A decision limiting some powers of tribal councils in order to harmonize them with general constitutional principles might provide a more just regime in the Northeast without violating

[36] *Supreme Court Advocates-on-Record Association & Anor v. Union of India*, [2015] 13 SCR 1.

the intent behind the Sixth Schedule, but would it always be seen that way? Discipline and removal of judges are finalized by votes in the two houses of parliament, where the views of the BJP would be important.

Nigeria's process for removing a chief justice involves a vote of the Senate and the concurrence of the president. Nigeria's president managed to remove the chief justice on the eve of the presidential election of 2019, based on a claim of the latter's alleged violation of the code of conduct for public officials.[37] Nigeria's courts might still have considerable leeway as they exercise judgment on indigenous preferences, but courts would undoubtedly prefer that politicians deal with it.

As I suggested, additional judicial decisions in Malaysia concerning freedom of religion might be difficult. The post-2022 coalition is headed by a coalition-within-the-ruling-coalition that benefits from many seats won by a mainly non-Malay (Chinese and Indian) party. That coalition would not be likely to object to a Federal Court more faithful to the constitution, even on controversial issues. Since 2018, however, governing coalitions have been short-lived, and there are some future coalitions that might see the matter differently. The constitution gives the Malaysian prime minister a substantial role in the processes of appointing and removing judges, and some future prime ministers might attempt to use those powers to bolster support by removing judges.

To judge by formal powers and previous political intrusions, judiciaries in all six countries are vulnerable to threats to their independence. Together with the failure of political leaders at the center to anticipate problems in devolved units, the powers of politicians to intrude into the appointment and removal of judges help explain the incomplete rule-of-lawness that prevails at regional levels.

Rule-of-Lawness, Democracy, and Order

It is almost certainly true that large numbers of citizens of the four countries we have been discussing are not currently experiencing a profound sense of rule-of-lawness, that "legal backdrop" that Tamanaha suggests allows citizens to go about their business secure in the knowledge that the law will not create some irrational impediment to pursuing legitimate activities. Various forms of discrimination are obstacles that create strong impediments, for some on a daily basis and for others only sporadically, but they must surely be felt.

[37] For an account of the removal and an argument that it was unlawful, see *This Day* (Apapa), November 18, 2024, p. 1.

It is not that there is no rule of law in these countries. One cannot read all the judgments they have produced, most of them well-reasoned judgments, generally fair, albeit occasionally tinged with ethnic bias in Kenya, and then find that the rule of law is somehow completely absent. Especially in India and Nigeria, it is not absent but blocked at crucial junctures not of the judges' making. In Malaysia, a misreading of a constitutional amendment regarding Syariah-court jurisdiction produced a blockage that has now been corrected, and Kenya's customary procedures have generated questionable outcomes whose replication in future cases it would be easy to avoid.

In this final section, I want to note some practical connections of democracy to the rule of law, and to the order that law should bring, that might also be helpful.

There is abundant evidence that a major support for the rule of law can be found in political pluralism. Wherever two or more political parties compete and alternate in elections to form governments in states, provinces, or entire countries, their competition tends to create and can sustain democratic institutions and the rule of law that accompanies them. In the margin below, I cite studies from various angles that all reach the same conclusion: that political pluralism in a jurisdiction gives rise to democratic practice and judicial independence, whereas lack of competition produces autocracy and a compliant judiciary.[38] One could cite dozens of studies pointing in the same direction. Typically, these effects can last from years to generations.

All four of the countries on which we have been focused here have had at least a modicum of democratic competition and pluralism, with some positive results for judicial autonomy. The highest courts of Kenya and Malaysia have been (re)asserting their independence. So has the Indian Supreme Court. Nigeria's Supreme Court has been careful to avoid the most controversial decisions, but it has not altogether neglected to find for those mistreated by the indigenousness requirement in the most egregious ways.[39] Even Ethiopia's quasi-judicial adjudicatory body has had its rare moments of providing relief from the absolute preeminence of titular groups controlling states. But in all three cases of constitutional contradictions, politicians have so far failed in the task of rectification.

[38] See, e.g., Gabriel L. Negretto, "Replacing Constitutions in Democratic Regimes: Elite Cooperation and Citizen Participation," in Negretto, ed., *Redrafting Constitutions in Democratic Regimes: Theoretical and Comparative Perspectives* (Cambridge: Cambridge University Press, 2020), pp. 101–27; Agustina Giraudy, *Democrats and Autocrats* (Oxford: Oxford University Press, 2015); Marcelo Leiras et al., "Who Wants an Independent Court? Political Competition and Supreme Court Autonomy in the Argentine Provinces (1984–2008)," *Journal of Politics*, Vol. 77, no. 1 (2015), pp. 175–87; Chávez, "The Construction of the Rule of Law in Argentina." (The democratic pluralism of one province, with its benign effects on the rule of law, and the autocracy of the one next door with its malign effects, depicted by Chávez, both continue decades after they were first observed.)

[39] See the *Lafia* case, discussed in Chapter 6.

What has been missing have been organized movements among citizens suffering rights deprivations to attempt to persuade political leaders of the need to change course, especially in India, Nigeria, and Ethiopia, although the violence in all three provides a cautionary note.[40] It was foreseeable that these policies would create vast numbers of beneficiaries whose vested interests would make reversibility very difficult. But surely, when the number of armed gangs in India's Northeast surpasses 100, it is time for government to engage in a rethinking. Likewise, when thousands have been killed in Nigeria as a result of indigenousness disputes over many years, the time is ripe for reconsidering the wisdom of failing to provide state-level police forces, with the result that in their stead, poorly trained vigilante forces, official and unofficial, increase insecurity, rather than security.

These are rule-of-law issues as surely as judicial independence is, and they make clear that the failings of these governments are not confined to the maladroit choice to continue nearly unchecked preferences long after their adverse effects were visible. Expansive Scheduled Tribe preferences have been part of the Indian constitution for three quarters of a century, despite their impact on neighbors of the beneficiary Scheduled Tribes. The arbitrary Nigerian decision to favor indigenes in states that contain numerous residents who are deprived of a slip of paper that is the key to their well-being has been in force for more than four and a half decades. A similar story can be told for titular nationalities who have enjoyed preeminence for over three decades in Ethiopia. Those decisions are impossible to defend, but they are made far more harmful by the inability of central and state governments in each country to maintain a modicum of order in the relevant states. As governments and their courts work to bring the rule of law to bear on these problems, central governments need also to bring the order that follows law to them. Authorities in other countries contemplating devolution to heterogeneous units need to take early precautions against discrimination and the violence that accompanies it. Still, there is no worse lacuna in redress of major wrongs created by the state than one forced on judges who cannot, and stymied by politicians who will not, eliminate them.

None of this exempts the three countries whose constitutions do not contain contradictory provisions from the need to extirpate the devils in devolution. Malaysia has made a serious start on state-level religious discrimination, while courts in Indonesia and Kenya maintain distinctive barriers to adequate adjudication. The repair in each would be different, but self-inflicted wounds, like constitutional contradictions, can surely yield to political and judicial therapy.

[40] Particularly the Kuki attacks on Meitei in 2023, when the latter were merely asking for comparable privileges to those of the Kuki in Manipur.

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